No. 3964

1338

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, and R. McCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased, the Plaintiffs in a Suit Pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of Said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY L. TYNAN), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3964

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, and R. McCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased, the Plaintiffs in a Suit Pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of Said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY L. TYNAN), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index.

Names and Addresses of Attorneys of Record.

ALFRED J. HARWOOD, Esq., Kohl Building, San Francisco, Calif.,

Attorney for Appellants Adelaide McColgan, as Admrx., and R. McColgan.

JOHN L. TAUGHER, Esq., and WM. F. ROSE, Esq., Mills Building, San Francisco, Calif.,

Attorney for Appellee, Frederick V. Lineker, as Admr., etc.

Messrs. MASTICK & PARTRIDGE, Foxcroft Building, San Francisco, Calif.,

Attorneys for Appellees, R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Unions Savings Bank of Modesto and Stanislaus Land and Abstract Company.

Messrs. CULLINAN & HICKEY, Phelan Building, San Francisco, Calif.,

Attorneys for Appellee, Eustace Cullinan.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Amended Bill of Complaint.

Come now the above-named plaintiffs, and by leave of Court specially granted, bring this, their Amended Bill of Complaint against R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Daniel A. McColgan, R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and thereupon the plaintiffs complain and say:

I.

That the plaintiffs, Frederick V. Lineker and

Norvena Lineker, his wife, are citizens, and each of them is a citizen of the Dominion of Canada, and subjects of George IV, King of England, and aliens.

II.

That the defendants, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, are, and each of them is and at all the times herein mentioned has been a corporation organized and existing under the laws of the State of California, and each of them has its principal office and place of business in the City of Modesto, in the Northern District of California, and that all the other defendants above named are citizens of the State of California, and of the United States, and that all of said above-named defendants reside in the Northern District of California.

III.

That the amount of controversy herein, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000). [1*]

IV.

That on or about the 19th day of November, 1907, Norvena Lineker (formerly Norvena Svensen), became the owner of that certain real property situated in the County of Stanislaus, State of California, more particularly described as follows, to wit:

All that portion of the Northwest Quarter of Section Six (6), Township Four (4) South, Range Nine (9) East, Mt. Diablo Base and Meridian, lying North and West of the road in said county known as the Paradise Road.

Page-number appearing at foot of page of original certified Transcript of Record.

That on the 2d day of September, 1914, and at all times since that date, said real property has been of the value of Sixty Thousand Dollars ($60,000.00) and upwards, and said real property is now of the value of Seventy-five Thousand Dollars ($75,000.00) and upwards.

V.

That on or about the 22d day of September, 1912, Norvena Lineker and Frederick V. Lineker, plaintiffs herein, intermarried and ever since that time they have been, and now are husband and wife.

VI.

That on or about the 18th day of August, 1913, the plaintiff, Norvena Lineker, made an instrument in the form of a deed of said property to her husband, Frederick V. Lineker, so that he might be in a better position to assist her in protecting her interest in the above-described real property; that there was no consideration given or received for the making of said instrument; that neither of said plaintiffs have at any time made any transfer of their interest or ownership of said real property, or any part thereof, except as in this Bill of Complaint set forth. [2]

VII.

That on or about the 20th day of June, 1910, and while she was the owner of said real property, the plaintiff Norvena Lineker (then Norvena Svensen), executed and delivered to the defendant, Daniel A. McColgan, a deed of trust, wherein and whereby she conveyed the said real property to R. McColgan, as Trustee, to secure the payment by her of a cer-

tain promissory note dated June 20th, 1910, executed by her to the said defendant, Daniel A. McColgan, for the sum of Twenty-eight Hundred and Fifty Dollars ($2,850.00), and to secure the payment also of other sums that might be loaned by said Daniel A. McColgan to Norvena Lineker (then Norvena Svensen), and evidenced by promissory note or notes of said Norvena Lineker, and also to secure the payment of such other money as might be paid or advanced by the defendant, Daniel McColgan, or R. McColgan, for her use and benefit, and also any liens or encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them, might properly pay or discharge a copy of which said Deed of Trust is hereby annexed, marked Exhibit "A" and made a part hereof.

That the said R. McColgan did not in fact lend to said Norvena Lineker, the full sum of $2,850.00, mentioned in said note dated June 20th, 1910, but only the sum of $2,500.00.

VIII.

That on or about the 2d day of September, 1914, the said real property was sold by R. McColgan, as trustee named in said Deed of Trust, and at said sale the said real property was sold, or attempted to be sold by R. McColgan, as such trustee, to R. S. Marshall, one of the above-named defendants.

IX.

That the defendants, Daniel A. McColgan and R. McColgan, unlawfully and fraudulently claimed that they were entitled under said Deed of Trust

to a sum greatly in excess of the $2,500.00 so advanced by said McColgan, on June 20th, 1910, [3] and the interest thereon and the legal expenses incidental thereto, and said defendants claimed that they were entitled under said deed of trust to the sum of Ten Thousand Dollars ($10,000) and upwards, which claim was false and untrue to the knowledge of the said defendants, Daniel McColgan and R. McColgan, but that the said defendants Daniel A. McColgan and R. McColgan stated to the plaintiff, Frederick V. Lineker, that if he did not procure and turn over to them before the 2d day of September, 1914, the sum of Ten Thousand Dollars ($10,000.00), they would sell out all interest that the plaintiffs, Norvena Lineker and Frederick V. Lineker, had in and to said real property, and cause them to lose all their right, title and interest therein; that in order to prevent a sale of their interest in said property, the plaintiffs procured one Annie V. Connors to advance upon the security of said real property the sum of Thirteen Thousand Dollars ($13,000.00) and relying upon such promise the plaintiff, Frederick V. Lineker, was prepared to purchase said property at the sale under said Deed of Trust to McColgan, and to bid at said sale such amount as might be necessary to protect the property from purchase by anyone else.

X.

That shortly prior to the said sale, the said defendants Daniel A. McColgan and R. McColgan, advised the plaintiff, Frederick V. Lineker, that he ought to bid for said property at said sale at least

the sum of Fourteen Thousand Dollars ($14,000.00), and that it would make little or no real difference in the final settlement of the accounts between the plaintiffs and said Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for said property, for the reason that the plaintiffs would only have to pay to the defendants Daniel A. McColgan and R. McColgan what was justly due under said Deed of Trust dated June 20th, 1910, and that all sums in excess [4] of such amount for which the property might be sold, would be accounted for to the said plaintiffs by said defendants, Daniel A. McColgan and R. McColgan and turned over to the plaintiffs by said defendant, R. McColgan.

That on the day that said property was sold under said Deed of Trust dated June 20th, 1910, to wit, on September 2d, 1914, and before the sale thereof, the attorney representing Annie V. Connors, one J. W. Bingaman, suggested that it might better serve the interest of the plaintiffs and of said Annie V. Connors, if said real property was purchased in the name of some person other than said plaintiffs, or either of them, but as trustees for the said plaintiffs, to which plan the said defendants Daniel A. McColgan and R. McColgan agreed, and they and the attorney for said Annie Connors, urged the plaintiff, Frederick V. Lineker, to permit the sale to be made to one R. S. Marshall, as trustee and agent of said Frederick V. Lineker.

XI.

That the said plaintiffs, being inexperienced in business matters, and particularly in matters relat-

ing to the transfer, sale or encumbering of real property, and relying upon the advice and counsel of the defendants, Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. S. Marshall, as trustee for the said plaintiff, Frederick V. Lineker; that on the 2d day of August, 1914, the said real property was sold by R. McColgan, as Trustee under said Deed of Trust, to the defendant R. S. Marshall, as agent and trustee for the plaintiff, Frederick V. Lineker, for the sum of Fourteen Thousand Dollars ($14,000.00).

XII.

That the defendant, R. S. Marshall, and his wife, Olive H. Marshall, gave their promissory note for Thirteen Thousand Dollars ($13,000.00) to said Annie Connors, and executed a Deed of Trust conveying said land to M. J. Connors and B. M. Lyons, trustees for the said Annie Connors, and received from said [5] Annie Connors the sum of $13,000.00, which amount was thereupon turned over and paid to the said R. McColgan, trustee, under the said Deed of Trust dated June 20th, 1910.

XIII.

That on or about the 3d day of September, 1914, the plaintiff, Frederick V. Lineker, and the defendant R. S. Marshall, entered into a certain agreement in writing, in the words and figures following, to wit:

"THIS MEMORANDUM OF AGREEMENT, made and entered into this 2d day of September, 1914, between R. S. Marshall of the County of Stanislaus, State of California, the party of the

first part, and Fred V. Lineker, of the County of Alameda, State of California, the party of the second part, Witnesseth:

"WHEREAS, R. S. Marshall has this day purchased for said Fred V. Lineker that portion of the Northwest quarter of Section Six (6) Township Four (4) South Range Nine (9) East, Mount Diablo, lying North and West of the County Road known as the Paradise Road, and being situated in the County of Stanislaus, State of California, and in accordance with his understanding and agreement, has given his promissory note secured by deeds of trust upon said premises, one for $13,000.00 to Annie Connors, and one for $2,455.00 to Daniel A. McColgan, and has become personally liable therefor.

"It is agreed by and between the said parties hereto that said party of the first part shall cause the said premises to be surveyed, and subdivided and sell the same, upon the terms and conditions hereinafter specified, and the proceeds thereof shall be divided as hereinafter specified, the said share going to the party of the first part being for and in consideration of the labor and services performed by him, and the responsibility assumed by him. [6]

"It is further understood that of the $2,455.00 loan, $455.00 has been used to pay the first six months' interest of the $13,000.00 loan, and that possibly the said party of the second part may require, for his own use prior to the sale of any of said premises, some money from time to time,

and the party of the first part agrees that in case the said party of the second part desires, he will repay to him the said sum of $455.00, said amount, however, to be paid at the rate of not more than $75.00 per month.

"The party of the first part, as hereinbefore specified, is immediately to cause the said premises to be surveyed and laid out, and upon the sale of said premises, or any portion thereof, the proceeds are to be applied as follows, to wit:

"Toward the payment of the principal and interest of any of the aforesaid indebtedness, and taxes and assessments imposed upon said premises, and any other expenses that by subsequent agreement between the parties may be incurred, and the balance is to be divided equally between the parties hereto.

"It is understood that said land is to be sold at such prices as from time to time may be agreed upon between the parties hereto.

"This agreement is intended to extend to and bind the heirs, executors, administrators and assigns of the parties hereto.

"In case the parties are unable to agree as to the price of sale, said matter shall be submitted to arbitration.

"In Witness whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

"R. S. MARSHALL.
"FRED V. LINEKER."

That on said 2d day of September, 1914, without any real consideration whatever passing from the said R. McColgan [7] or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully, and in fraud of the plaintiffs' rights herein, made or attempted to make a certain Deed of Trust to the defendants R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, for the sum of Two Thousand Four Hundred and Forty-five Dollars ($2,445.00), or thereabouts.

XIV.

That thereafter and on or about the 22d day of January, 1917, the said R. McColgan and Eustace Cullinan proceeded to sell, or did attempt to sell the said real property under said last mentioned Deed of Trust, and that at such sale the said real property was purchased, or attempted to be purchased, by the defendant, E. C. Peck, and that subsequently the said E. C. Peck sold and conveyed, or attempted to sell and convey the said real property to the defendant, T. K. Beard and that subsequent thereto the said defendant, T. K. Beard and Grace A. Beard sold and conveyed, or attempted to sell and convey a one-half (½) interest in and to said real property to the defendant, R. S. Marshall.

XV.

That the plaintiffs are informed and believe, and upon such information and belief allege: That on or about the 4th day of March, 1918, said T. K. Beard and Grace A. Beard, his wife, and R. S. Mar-

shall and Olive H. Marshall, his wife, made, executed and delivered to the defendant, Union Savings Bank of Modesto, a corporation, a promissory note for the sum of Fifteen Thousand Dollars ($15,000) and as security therefor made, executed and delivered, or attempted to make, execute and deliver to the Stanislaus Land and Abstract Company, their deed of trust conveying said real property hereinabove described, for the benefit of the said Union Savings Bank of Modesto, and the defendants T. K. Beard [8] and R. S. Marshall now claim to be the owners in fee simple absolute of said real property, subject to said Deed of Trust to the Stanislaus Land and Abstract Company, trustees for the said Union Savings Bank.

XVI.

The plaintiffs allege that said pretended Deed of Trust made by the defendant, R. S. Marshall and his wife, Olive H. Marshall, to R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, was made without any consideration therefor, and for the purpose of obtaining for the defendants Daniel A. McColgan and R. McColgan, an unconscionable and illegal advantage of plaintiffs and of wrongfully obtaining more than was due from the plaintiffs to the defendant, Daniel A. McColgan.

XVII.

That each and all other transfers and attempted transfers of said property and all dealings therewith by any of the defendants subsequent to said 2d day of September, 1914, were made without the

plaintiffs' consent, and were made without any consideration passing to the plaintiffs, or either of them, and are void and illegal.

XVIII.

That prior to the commencement of this action and on or about June 3d, 1918, the plaintiff Frederick V. Lineker revoked and rescinded all right of the said defendant, R. S. Marshall, to act for the said Frederick V. Lineker, as agent or otherwise, under the agreement between them dated September 2d, 1914.

XIX.

That on the 2d day of September, 1914, the said Daniel A. McColgan received from said Annie Connors the sum of Thirteen Thousand Dollars ($13,000), which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them; and that the Deed of Trust attempted to be made by [9] the defendants, R. S. Marshall and Olive H. Marshall to R. McColgan and Eustace Cullinan, as trustee for Daniel A. McColgan, was without any consideration and void as against these plaintiffs, and that all attempted conveyances and all charges against said land under said Deed of Trust are void, illegal, and made without any consideration moving to these plaintiffs, or either of them, and that any and all conveyances attempted to be made by said R. McColgan and Eustace Cullinan, as trustees for Daniel A. McColgan, under said alleged Deed of Trust dated September 2d, 1914, are void and of no virtue as against these plaintiffs, or either of them, and that the attempted

conveyance hereinbefore mentioned and described by said R. McColgan and Eustace Cullinan to E. C. Peck is void, and of no virtue as against these plaintiffs, or either of them, and that the attempted conveyances of said property by E. C. Peck to the defendant, T. K. Beard, and the subsequent attempted conveyance of said property by T. K. Beard and Grace A. Beard to R. S. Marshall, are and each of them is unlawful and void of any effect as against these plaintiffs, or either of them.

XX.

That said Daniel A. McColgan and said R. McColgan have never paid over to the said plaintiffs, nor to either of them, any part of the said $13,000.00 so advanced by said Annie Connors and received by said defendants Daniel A. McColgan and R. McColgan, and have never accounted to the said plaintiffs, or either of them, for the said money or any part thereof.

WHEREFORE, plaintiffs pray that it be decreed and adjudged by this Honorable Court, that the Deed of Trust made by said R. S. Marshall to R. McColgan and Eustace Cullinan, dated on or about the 2d day of September, 1914, to secure the repayment of the sum of $2,445.00 be declared null and void as against these plaintiffs, and that the attempted transfer of said property [10] by R. McColgan and Eustace Cullinan to E. C. Peck be declared null and void as against these plaintiffs, and that the subsequent attempted transfer of said property from E. C. Peck to T. K. Beard be declared null and void as against these plaintiffs, or

either of them; and that the subsequent transfer of said property by T. K. Beard and Grace A. Beard to said R. S. Marshall be declared null and void as against these plaintiffs, and that the alleged Deed of Trust made by T. K. Beard and Grace A. Beard, his wife, and R. S. Marshall and Olive H. Marshall, his wife, to the Stanislaus Land and Abstract Company, as trustee for the Union Savings Bank of Modesto, be declared null and void as against these plaintiffs.

2d. That the said plaintiffs be declared and adjudged the lawful owners of the property hereinbefore described.

3d. That account be taken of the loan made by Daniel A. McColgan to the plaintiff Norvena Lineker on or about the 20th day of June, 1910, and all moneys paid thereunder, and an account of all sums of money that have been received by the defendants, Daniel A. McColgan, and R. McColgan on account thereof, and from any and all sales of said real property be taken, and that the amount justly owing to the plaintiffs thereunder be ascertained and declared.

4th. That an account be taken of all moneys received by R. S. Marshall, as trustee for said Frederick V. Lineker, and of all moneys that have been properly paid out and expended by him as such Trustee; and that an account of any and all sales of real property made by said R. S. Marshall, if any, within his authority, and of all moneys received therefor be taken, and of all moneys property expended by him.

5th. That any balance found due to the plaintiffs from such accounting be ordered paid to them, and that they have such decree therefor against the defendants, and each of them, as shall be just; [11]

6th. That the defendants be compelled to convey said lands by good and sufficient Deed to the plaintiffs herein, free and clear of any liens or encumbrances thereon, if any such there be, that have been caused or permitted by them, or either of them.

7th. That the plaintiffs have such other and further decree and relief herein as shall be agreeable to equity and good conscience.

8th. That the plaintiffs recover their costs herein.

JOHN L. TAUGHER,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Frederick V. Lineker, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing amended bill of complaint; that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

FRED V. LINEKER.

Subscribed and sworn to before me this 14th day of January, 1920.

[Seal] OLIVER DURR,

Notary Public in and for the City and County of San Francisco, State of California. [12]

Exhibit "A."

NORVENA E. SVENSEN, a Single Woman,

vs.

R. McCOLGAN, Trustee.

This Deed of Trust, made this twentieth day of June, 1910, between Norvena E. Svensen, a single woman of Modesto, Stanislaus County, California, the party of the first part, and R. McColgan of the City and County of San Francisco, State of California, the party of the second part, and Daniel A. McColgan, also of San Francisco, California, the party of the third part,

WITNESSETH: Whereas the said party of the first part has borrowed and received of the said party of the third part, in Gold Coin of the United States, of the present standard, the sum of Twenty-eight Hundred and Fifty ($2850.00) Dollars, and has agreed to repay the same, with interest to the said party of the third part or his order in like Gold Coin according to the terms of a certain promissory note of even date herewith, executed and delivered therefor by the said party of the first part,

Now This Indenture Witnesseth: That the said party of the first part, in consideration of the afore-

said indebtedness to the said party of the third part, and of One Dollar to her in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note, and of any sum or sums of money, with interest thereon, that may be paid or advanced by, or may otherwise be due to the party of the second part, or party of the third part under the provisions of this instrument, and also such additional sums as may be hereafter borrowed and received, by the said party of the first part, from the party of the third part, and evidenced by another promissory note of the said party of the first part, has granted, bargained, sold, conveyed and confirmed, and does hereby grant, bargain, sell, convey and confirm [13] unto the party of the second part and to his successors and assigns the piece or parcel of land situate in the County of Stanislaus, State of California, described as follows:

The fractional Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) east, Mount Diablo Base and Meridian.

Save and except the following described parcel of land, to wit:

Beginning at a 3″x2″ redwood post at the Southeast corner of the Northwest quarter of Section six (6), Township Four (4) south, Range Nine (9) East, Mount Diablo Base and Meridian, running thence South 89° 45′ West, 30.80 chains; thence North 0° 30′ west .45 chains; thence North 50° 0′ East 40.15 chains; thence South 0° 15′ East 26.12

chains to point of beginning. Containing 40.84 acres.

The grantor specially covenants with said second and third parties that she will pay all or any taxes or assessments on the said money loaned or on this Deed of Trust or on any future advances or on the property herein described, or on all the obligations hereby secured.

And also all the estate and interest, homestead or other claim or demand, as well in law as in equity, which the said party of the first part now has or may hereafter acquire of, in and to the said premises, with the appurtenances.

To Have and To Hold the same to the party of the second part and to his successors and assigns, upon the trusts and confidences hereinafter expressed, to wit:

First. During the continuance of these trusts the party of the third part and the party of the second part, their successors and assigns, are hereby authorized to pay, without previous notice, all taxes, assessments and liens, now subsisting or which may hereafter be imposed by National, State, County, City or [14] other authority, or which may appear, *prima facie,* to subsist or be imposed upon said premises to whomsoever assessed, and all or any encumbrances now subsisting, or that may hereafter subsist thereon which may, in their judgment, affect said premises, or these trusts, at such time as in their judgment they may deem best, or in their discretion for the benefit and at the expense of said party of the first part, to con-

test the payment of any such taxes, assessments, liens or encumbrances, or defend any suit or proceeding instituted for the enforcement thereof; and in like manner to prosecute or defend any suit or proceeding that they may consider proper to protect the title to said premises; and to keep the buildings now erected or which may hereafter be erected on said premises insured against loss by fire in the sum of Twenty-eight Hundred and Fifty ($2850.00) Dollars (or less in their discretion), with such Company or companies as they may deem proper, loss, if any, payable to the party of the third part; and these trusts shall be and continue as security to the party of the third part and of the second part, and their successors and assigns for the repayment in Gold Coin of the United States of the moneys so borrowed by said party of the first part and the interest thereon, and of all amounts so paid out, and costs and expenses incurred as aforesaid, whether paid by the party of the second part or party of the third part, with interest on such payments at the rate of one per cent per month until final repayment, which disbursement and interest the party of the first part hereby agrees to pay.

Secondly. In case the said party of the first part shall well and truly pay or cause to be paid at maturity in Gold Coin as aforesaid, all sums of money so borrowed as aforesaid, and the interest thereon, and shall upon demand repay all other moneys secured or intended to be secured hereby, and also the reasonable expenses of this trust, then the

party of the second part, [15] the, his successors and assigns, shall reconvey all the estate in the premises aforesaid to her by this instrument granted, unto the said party of the first part and assigns, at her request and cost.

Thirdly: If default shall be made in the payment of any of said sums or principal or interest, when due, in the manner stipulated in said promissory note, in *in* the reimbursement of any amounts herein provided to be paid or of any interest thereon, then the said party of the second part, his successors or assigns, on demand by the party of the third part, or his assigns, shall sell the above granted premises or such part thereof, as in his discretion he shall find it necessary to sell, in order to accomplish the objects of this trust in the manner following, namely:

The trustee shall first publish the time and place of such sale, with a description of the property to be sold, at least once a week for four successive weeks, in some newspaper published in the County Seat of the County wherein said property or a portion thereof is situated, and may from time to time postpone such sale by publication; and on the day of sale so advertised, or to which such sale may be postponed, may sell the property so advertised or any portion thereof, at public auction at the time and place specified in the published notice to the highest cash bidder, and the holder or holders of said promissory note his agent or assigns, may bid and purchase at such sale.

The trustee may sell said premises, as above described, as a whole, or in his discretion, in such reasonable parcels or subdivisions as he in his judgment may deem advisable.

And the party of the second part or his successors or assigns, shall establish as one of the conditions of such sale that all bids and payments for said property shall be made in like gold coin as aforesaid, and upon such sale he shall make, execute and, after [16] due payment made, shall deliver to the purchaser or purchasers his or their heirs and assigns, a deed or deeds of the premises so sold, and out of the proceeds thereof shall pay:

First: The expenses of such sale, together with the reasonable expenses of this trust, including counsel fees of One Hundred ($100.00) dollars, in Gold Coin, which shall become due upon any default made by the said party of the first part, in any of the payments aforesaid.

Second: All sums which may have been paid, under or in accordance with the provisions hereof, by the said party of the third part, or the party of the second part, his successors or assigns or the holder or holders of the note aforesaid, and not reimburse, which may then be due, whether paid on account of encumbrances or insurance as aforesaid, or in the performance of any of the trusts herein created; together with any additional sums borrowed as aforesaid, and with whatever interest may have accrued thereon; next, the amount due and unpaid on said promissory note, with whatever interest may have accrued thereon; and lastly, the

balance or surplus of such proceeds, if any, to said party of the first part, or —— assigns.

And in the event of a sale of said premises, or any part thereof, and the execution of a deed or deeds therefor, under these trusts then the recitals therein of default and publication of notice of sale, and a demand by the party of the third part, his successors or assigns, that such sale should be made, shall be conclusive proof of such default and of the due publication of such notice, and that the sale was made on due and proper demand, by the party of the third part, his successors or assigns; and any such deed or deeds, with such recitals therein shall be effectual and conclusive against the said party of the first part, her heirs or assigns, and all other persons as to such default, publication and demand; and the receipt for the purchase money contained in any [17] deed executed to a purchaser as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the trusts aforesaid.

It is expressly covenanted that the party of the third part may, from time to time, appoint other Trustee or Trustees to execute the trusts hereby created; and upon such appointment, and a conveyance to her by the party of the second part, or his successors or assigns, the new Trustee shall be vested with all the title, interest, powers, duties and trusts in the premises, hereby vested or conferred upon the party of the second part. Such new Trustee shall be considered the successors

and assigns of the party of the second part within the meaning hereof.

If a corporation, a copy of such Resolution, certified by the Secretary of the party of the third part, under its corporate seal and attached to the instrument of assignment or transfer shall be conclusive proof of the proper appointment of such substituted Trustee or Trustees.

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written.

NORVENA E. SVENSEN. (Seal)

Signed, sealed and delivered in the presence of

WILLIAM WINTER.

State of California,
City and County of San Francisco,—ss.

On this 20th day of June, in the year one thousand nine hundred and ten, before me, Matthew Brady, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Norvena E. Svensen, a single woman, [18] known to me to be the person described in and who executed, and whose name is subscribed to the within and foregoing instrument and she acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MATTHEW BRADY,
Notary Public, in and for said City and County of San Francisco, State of California.

Recorded at the request of D. McColgan April 22, 19—at 42 min. past 11 o'clock A. M. in Vol. 146 of Deeds, page 378, Records of Stanislaus County.

H. C. KEELEY,
Recorder.

Receipt of a copy of the within amended bill of complaint admitted this 15th day of January 1920.

HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for Defendants, Marshalls, Peck & Beard and Mary J. Dillon.

CULLINAN & HICKEY,
Attys. for Defendants, McColgans & Eustace Cullinan.

[Endorsed]: Filed Jan. 15, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), DANIEL A. McCOLGAN, R.

McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK of MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Answer of Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan.

Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, answering the amended bill of complaint on file herein, admit, deny and allege as follows, to wit:

I.

Said defendants have no information or belief upon the subject of paragraph I of said amended complaint sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that the plaintiffs are, or that either of them is, a citizen of the Dominion of Canada, or a subject of King George IV or King George V of England, and deny that said plaintiffs are, or that either of them is, an alien.

II.

Said defendants have no information or belief upon the subject of paragraph VI of said amended bill of complaint sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that on or about the 18th day of August, 1913, the plaintiff Norvena Lineker made an instrument in the form of a deed of said property to her husband, Frederick V.

Lineker, and deny [20] that on or about the 18th day of August, 1913, or at any time, Norvena Lineker made such a deed to said Frederick V. Lineker so that he might be in a better position to assist her in protecting her interests in the real property described in said amended bill of complaint; deny that there was no consideration given or received for the making of said instrument, and deny that neither of said plaintiffs have at any time made any transfer of their ownership of said real property, or any part thereof, except as in said amended bill of complaint set forth, and in this respect said defendants allege that such a deed, bearing date August 18, 1913, was recorded in the office of the County Recorder of the County of Stanislaus, State of California on July 27, 1914, and not before.

III.

Answering the allegations in paragraph VII of said amended bill of complaint, said defendants deny that by the said deed of trust dated the 20th day of June, 1910, the said Norvena Lineker conveyed said real property to R. McColgan as trustee to secure the payment of such other money as might be paid or advanced by the defendant, Daniel A. McColgan or R. McColgan, for her, said Norvena E. Lineker's use and benefit, and also any liens or encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them, might properly pay or discharge, and in this behalf said defendants admit that the copy of the deed of trust annexed to plaintiff's

complaint is a correct copy thereof, and in this behalf said defendants allege that said deed of trust was so executed as security for the payment of said sum of $2850.00 and for the purpose of securing the payment of any sum or sums of money, with interest thereon, that may be paid or advanced by, [21] or may otherwise be due to the party of the second part in said deed of trust named, to wit, said R. McColgan, trustee, or the party of the third part in said deed of trust named, to wit, said Daniel A. McColgan, under the provisions of said deed of trust (which is hereinafter called the first deed of trust), and also such additional sums as may be thereafter borrowed and received by the said Norvena E. Lineker from the said Daniel A. McColgan and evidenced by another promissory note of said Norvena E. Lineker; and said deed of trust further provided that the said R. McColgan, as trustee, and the said Daniel A. McColgan, as party of the third part therein, were authorized to pay, without previous notice, all taxes, assessments and liens, then subsisting or which might thereafter be imposed by national, state, county, city or other authority or which may appear, *prima facie,* to subsist or be imposed upon said premises to whomsoever assessed and all or any encumbrance then subsisting or that might thereafter subsist thereon which may in the judgment of said R. McColgan, as trustee, or of said Daniel A. McColgan, affect said premises, or the trusts in said deed of trust mentioned, at such time as in their judgment they might deem best; and said

deed of trust further provided that it should be security to the said Daniel A McColgan and the said R. McColgan as trustee and their successors and assigns for the repayment of all amounts so paid out and costs and expenses incurred as in said deed of trust set forth, with interest thereon at the rate of one per cent (1%) per month until final repayment, which disbursements and interest the said Norvena E. Lineker by said deed of trust agreed to pay.

IV.

Said defendants deny that said R. McColgan did not in fact lend to Norvena E. Lineker the full sum of $2850.00 but [22] allege that said Daniel A. McColgan did in fact lend to said Norvena E. Lineker the full sum of $2850.00 mentioned in said note dated June 20, 1910, but in this behalf said defendants allege that said Norvena E. Lineker, out of said sum of $2850.00, paid to said R. McColgan, the sum of $350.00 as a commission for making said loan, and that said R. McColgan and said Daniel A. McColgan are, and at all times mentioned in said amended bill of complaint were, mortgage loan brokers engaged in the business of lending money of their own, and of other persons.

V.

Said defendants admit that on or about the 2d day of September, 1914, the said real property was sold by R. McColgan as trustee named in said first deed of trust, to wit, said deed of trust dated June 20, 1910, and admit that the said real property was sold by said R. McColgan, as such trustee, to

R. S. Marshall, one of the above-named defendants, and in this respect the said defendants allege that said real property was so sold at said time with the knowledge of said plaintiffs herein and that said R. S. Marshall who bought the said property, at said sale, and who is one of the defendants herein, attended said sale and purchased said property in pursuance of an agreement between said Frederick V. Lineker and Norvena E. Lineker, plaintiffs herein, and said R. S. Marshall, wherein and whereby it was understood and agreed that said defendant, R. S. Marshall, should attend said sale and purchase thereat for said Frederick V. Lineker, and Norvena E. Lineker or for himself and Frederick V. Lineker, and Norvena E. Lineker, the said real property in said amended bill of complaint described; that said R. S. Marshall in purchasing said real property at said sale on the said 2d day of September, 1914, acted as the agent and trustee of said Frederick V. Lineker and of said Norvena E. Lineker and with [23] their knowledge and consent and at their request, and that he bought said real property at said sale on said 2d day of September, 1914, for the use and benefit of said Frederick V. Lineker and said Norvena E. Lineker and that in said transaction said R. S. Marshall was a mere convenience, agent and representative of said Frederick V. Lineker and Norvena E. Lineker; and said defendants are informed and believe and on such information and belief allege that said R. S. Marshall and Frederick V. Lineker, at the time when said land was so

purchased by R. S. Marshall had some contract between themselves respecting the ownership or subdivision or sale of said land.

VI.

Said defendants admit that Daniel A. McColgan and R. McColgan claimed that they were entitled, under said deed of trust to a sum greatly in excess of $2500.00 and the $2850.00 so advanced by said McColgan on June 20, 1910, and the interest thereon and the legal expenses incident thereto, but deny that said Daniel A. McColgan and R. McColgan claimed that they were entitled, under said deed of trust, to the sum of $10,000.00, and upwards, and said defendants deny that said Daniel A. McColgan or R. McColgan or either of them unlawfully or fraudulently so claimed and deny that any claim of indebtedness made by said Daniel A. McColgan or R. McColgan in or about said transaction was false or untrue to the knowledge of said defendants Daniel A. McColgan and R. McColgan, or either of them; and in this behalf said defendants allege that on the 2d day of September, 1914, and prior to said sale said Daniel A. McColgan informed said Frederick V. Lineker that his total outlay in and about said deed of trust and transactions relating to said land was $10,116.00 and that he, said Daniel A. McColgan, intended to bid the sum of $10,116.00 for said land at said sale then about to be held; deny that said defendants Daniel A. McColgan and R. [24] McColgan, or either of them, stated to the plaintiff Frederick V. Lineker that if he did not procure and turn over to them before the 2d day

of September, 1914, the sum of $10,000.00 they would sell out all interest that the plaintiffs Norvena E. Lineker and Frederick V. Lineker had in or to said real property and cause them to lose all their right, title and interest therein, but in this behalf said defendants allege that they notified said Frederick V. Lineker and Norvena E. Lineker that they were about to sell said real property under the terms of said deed of trust unless, before such sale they received the amount which was due, owing and unpaid to said Daniel A. McColgan from said Frederick V. Lineker and Norvena E. Lineker, or either of them, and secured by said deed of trust.

Said defendants admit that the said plaintiffs procured one Annie E. Connors to advance, upon the security of said real property, the sum of $13,000.00 but deny that they did so to prevent a sale of their interests in said real property and deny that relying upon any promise of said Annie E. Connors, or any other person, plaintiff, Frederick V. Lineker, was prepared on said 2d day of September, 1914, or at any time prior thereto to purchase said property at the sale under said deed of trust to McColgan, to wit, said first deed of trust, or to bid at said sale such amount as might be necessary to protect the property from purchase by anyone else; and in this behalf the said defendants allege that on the 2d day of September, 1914, at the time of said sale, under said first deed of trust, the interest of said Norvena E. Lineker and of said Frederick V. Lineker, in said property was subject to certain attachments legally levied upon the

interest of said Frederick V. Lineker and Norvena E. Lineker in said land amounting in the aggregate to the principal sum of $2380.74 together with interest; said defendants allege that said attachments were subordinate to said first deed of trust; [25] that said Frederick V. Lineker and Norvena E. Lineker, while they had available or could borrow from said Annie E. Connors a sum sufficient to pay all moneys owing to or claimed by said Daniel A. McColgan and secured by said deed of trust as aforesaid, were afraid and unwilling to pay said Daniel A. McColgan the said sum, which said Daniel A. McColgan claimed to be due and owing and which was in fact due and owing to him and secured by said deed of trust as aforesaid, or other sums which he had expended in connection with said land, and which were not secured by said deed of trust, because, upon the satisfaction of the debt secured by said deed of trust and the reconveyance of said real property by said R. McColgan, as trustee named in said deed of trust to said Norvena E. Lineker and said Frederick V. Lineker, the interests of said Norvena E. Lineker and Frederick V. Lineker, or either of them would still be subject to said attachments for the aggregate principal sum of $2380.74 and interest thereon; that said Frederick V. Lineker and said Norvena E. Lineker for that reason refused to satisfy the debt to said Daniel A. McColgan, secured by said deed of trust, and thus compelled said R. McColgan, as trustee, to sell said real property under the terms of said first deed of trust, and that said Frederick V. Lineker and

Norvena E. Lineker procured and induced said R. S. Marshall to so purchase said real property at said trustee's sale on September 2d, 1914, to hold the said real property, so purchased by said R. S. Marshall, in trust for said Frederick V. Lineker or said Norvena E. Lineker, or both of them, in order that the legal title to said land might not revest in said Frederick V. Lineker or Norvena E. Lineker, and again become subject to the liens of said attachments aggregating $2380.74 and interest; that said real property was so purchased at said sale on the 2d day of September, 1914, by said R. S. Marshall and so held by him in trust for said Frederick V. Lineker and Norvena E. Lineker upon some agreement [26] or contract between said R. S. Marshall and Frederick V. Lineker to which neither said Daniel A. McColgan nor R. McColgan was a party, in order that said Frederick V. Lineker and Norvena E. Lineker might avoid the payment of the debts or obligations for which the said real property had been so attached for the aggregate principal sum of $2380.74; that the sale under said deed of trust which actually occurred on the 2d day of September, 1914, was first set and notice thereof published, to be held on the 24th day of May, 1914; that on said 24th day of May, 1914, at the time and place first set for such sale, representatives of some of said attaching creditors appeared and were apparently prepared to bid for the said real property; that said Frederick V. Lineker and Norvena E. Lineker were afraid that if said land were so sold under said deed of trust on the said

2d day of September, 1914, some of said attaching creditors would bid and would buy it for an amount equal to the sum so due said Daniel A. McColgan and secured by said deed of trust plus the amounts of said attachments and would thus not only get said land for less than its value but would leave in the hands of the trustee, said R. McColgan, a surplus, after the satisfaction of the indebtedness so due to said Daniel A. McColgan and secured by said deed of trust, which would probably be impressed and which they thought would be impressed under the law with the liens of said attachments:

On May 24, 1914, the date first set for said sale, said Frederick V. Lineker and Norvena E. Lineker did not have sufficient money to protect their title to said land against the bids of competing bidders at said sale under said deed of trust and the said sale under said deed of trust was on said 24th day of May, 1914, at the request of said Frederick V. Lineker continued to June 1, 1914, and was continued then successively at the request of said Frederick V. Lineker, to June 15, 1914, to June 30, 1914, to July 23, 1914, to August 6, 1914 and to September 2, 1914 and [27] at none of said times prior to September 2, 1914, was said Frederick V. Lineker or said Norvena E. Lineker prepared or able to bid at a sale, if held on such date under said deed of trust, a sum equal to the amount due, owing and unpaid to said Daniel A. McColgan and secured by said deed of trust, or a sum sufficient to secure the title to said land from being sold to strangers bidding at such sale.

VII.

Said defendants deny that said Daniel A. McColgan and R. McColgan, or either of them, on September 2, 1914, prior to said sale, or at any other time, advised the plaintiff Frederick V. Lineker that he ought to bid for said property at said sale at least the sum of $14,000.00 and in this behalf said defendants are informed and believe and upon such information and belief allege that said plaintiff was so advised to bid at least the sum of $14,000.00 for said land at said sale by L. V. Dennett, Esq., who was then and there his attorney at law in and about said transactions, and said defendants are informed and believe and upon such information and belief allege that said Dennett advised the said plaintiffs that it would be necessary for them, or for said R. S. Marshall, as their representative, agent and trustee, to bid for said property a sum of not less than $14,000.00 in order to prevent said attaching creditors or other competing bidders from acquiring the title to said land at said sale under said deed of trust.

VIII.

Said defendants deny that said Daniel A. McColgan and R. McColgan, or either of them, advised the plaintiff, Frederick V. Lineker, that it would make little or no difference in the final settlement of the accounts between the plaintiffs and Daniel A. McColgan and R. McColgan how much the plaintiffs bid on said property for the reason that the plaintiffs would only have to [28] pay to the defendants, Daniel A. McColgan and R. McColgan,

what was justly due under said deed of trust dated June 20, 1910, and that all sums in excess of such amount for which the property might be sold would be accounted for by the said defendants to the said plaintiffs, or turned over to plaintiffs by said R. McColgan, and in this behalf the said defendants allege that there was no agreement or understanding or conversation between said Frederick V. Lineker, or any person representing him, and said Daniel A. McColgan or R. McColgan respecting the disposition of any surplus that might remain in the hands of said R. McColgan, as such trustee, out of the sale price of said land after the payment and satisfaction of the debt due to said Daniel A. McColgan and secured by said deed of trust.

IX.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegations that on September 2, 1914, and before the sale of said real property, the attorney representing Annie E. Connors, one J. W. Binganman, suggested that it might better serve the interests of the plaintiffs and of said Annie E. Connors if said real property was purchased in the name of some person other than the name of said plaintiffs or either of them, but as trustee for said plaintiffs, and placing their denial upon such lack of information and belief, said defendants deny such allegation, and defendants deny that said Daniel A. McColgan and R. McColgan, or either of them agreed or were parties to said plan, but admit and allege that they were aware at the time

of such sale of a plan which they are informed and believe and upon such information and belief allege to have been suggested by L. V. Dennett, attorney for said plaintiffs, to have said R. S. Marshall purchase said land as trustee and agent for said Frederick V. Lineker and Norvena E. Lineker, but said defendants had no information at that time concerning the [29] conditions of any contract or agreement between said R. S. Marshall and said Frederick V. Lineker.

X.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegations that the plaintiffs are inexperienced in business matters or particularly in matters relating to the transfer, sale or encumbering of real property and placing their denial on that ground said defendants deny the allegations to that effect in said amended bill of complaint, and said defendants admit that the said plaintiffs consented that the said real property be bought by said R. S. Marshall, as trustee for the said plaintiff Frederick V. Lineker, but deny that they gave such consent relying upon the advise or counsel of defendants Daniel A. McColgan and R. McColgan, or either of them, and in this behalf said defendants allege that in and about said sale and all transactions leading up thereto the said plaintiffs acted upon the advice of their said attorney, L. V. Dennett, Esq., and not in any measure or respect upon the advice of said Daniel A. McColgan or R. McColgan, and said defendants admit that on the 2d day of September,

1914, the said real property was sold by R. McColgan, as trustee under said deed of trust, to defendant R. S. Marshall, as agent and trustee for the plaintiff Frederick V. Lineker for the sum of $14,000.00; but said defendants allege that said R. S. Marshall was unknown to said defendants Daniel A. McColgan and R. McColgan, prior to the day of said sale, and that said Daniel A. McColgan and R. McColgan did not suggest or find said R. S. Marshall as a purchaser at such sale, and that defendant Eustace Cullinan had no connection with said sale or any of said transactions on or prior to said September 2d, 1914. [30]

XI.

Said defendants admit and allege that on the 2d day of September, 1914, said R. S. Marshall and his wife, Olive H. Marshall, made and attempted to make a certain deed of trust to the defendants, R. McColgan and Eustace Cullinan, as trustee for the defendant Daniel A. McColgan, for the sum of $2455.00, but defendants deny that said deed of trust was without any consideration passing from said R. McColgan or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, and in this behalf said defendants allege that the said R. S. Marshall and Frederick V. Lineker and Norvena Lineker received a valuable consideration, to wit, the sum of $2455.00 for said deed of trust, which sum of $2455.00 was loaned to and received by said R. S. Marshall, as the agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, by said Daniel A. McColgan and said deed of trust

dated September 2, 1914, was so executed by said R. S. Marshall as the agent for and representative of said Frederick V. Lineker and Norvena E. Lineker, as security for the repayment of said sum of $2455.00 to said Daniel A. McColgan, and in this behalf said defendants further allege that said deed of trust, dated September 2, 1914, was so executed by said R. S. Marshall and Olive H. Marshall, his wife, with the full knowledge and consent and at the request and on behalf of said Frederick V. Lineker and Norvena E. Lineker his wife, and was not so executed wrongfully or fraudulently or in fraud of any rights of plaintiffs or either of them, or for the purpose of obtaining for the defendants Daniel A. McColgan and R. McColgan, or either of them any unconscionable or illegal or other advantage of plaintiffs or of wrongfully or otherwise obtaining more than was due from the plaintiffs or either of them to the defendant, Daniel A. McColgan.

XII.

Said defendants deny that any of the transfers of said property or any dealings therewith by any of the defendants subsequent to said 2d day of September, 1914, were made without any [31] consideration passing to the plaintiffs or either of them or were void or illegal.

XIII.

Said defendants deny that said Daniel A. McColgan received from said Annie Connors but admit and allege that he received from said R. S. Marshall, as agent and trustee for said Frederick V. Lineker

and Norvena E. Lineker on September 2, 1914, the sum of $13,000.00 and allege that he so received the sum of $14,000.00 (including said $13,000.00) on said 2d day of September, 1914, and admit that said sum of $14,000.00 was in excess of all moneys due or owing to Daniel A. McColgan from the plaintiffs or either of them on said date, but in this behalf said defendants allege that at the time of said sale of said real property on said 2d day of September, 1914, neither said Frederick V. Lineker nor said Norvena E. Lineker was the owner of said real property, or was entitled to any surplus of said sum of $14,000.00 remaining in the hands of said R. McColgan, as such trustee, after the satisfaction of the debt owing from said Norvena E. Lineker to Daniel A. McColgan the payment of which was secured by said deed of trust as aforesaid, and said defendants deny that the deed of trust so made on September 2d, 1914, by R. S. Marshall and Olive H. Marshall to R. McColgan and Eustace Cullinan, as trustees for Daniel A. McColgan, was without any consideration or void, and deny that all or any attempted conveyances or charges against said land under said deed of trust are void or illegal or made without consideration, and deny that any conveyance made by said R. McColgan and Eustace Cullinan, as trustees under said deed of trust, dated September 2d, 1914, is void or of no virtue as against said plaintiffs or either of them, and deny that the said conveyance by R. McColgan and Eustace Cullinan, as trustees, to E. C. Peck is void, or of no virtue as against said plaintiffs or either of them. [32]

XIV.

FIRST SPECIAL DEFENSE—PURCHASE OF THE TITLE.

And as a further and separate answer and defense said defendants allege the following facts:

Norvena E. Svensen on June 20, 1910, executed to defendant, R. McColgan, as trustee for defendant, Daniel A. McColgan, a deed of trust conveying the land in Stanislaus County, State of California, described in plaintiffs' amended bill of complaint, as security for the payment of certain loans made or thereafter to be made to Norvena E. Svensen by Daniel A. McColgan. A copy of said deed of trust is attached as an exhibit to plaintiffs' amended bill of complaint.

On September 22, 1912, plaintiff, Frederick V. Lineker, married Norvena E. Svensen, and on July 27, 1914, said Frederick V. Lineker recorded in the office of the County Recorder in the County of Stanislaus, State of California, a deed, dated August 18, 1915, by which said Norvena E. Lineker conveyed and granted said land to said Frederick V. Lineker. The said deed of trust, hereinafter called the first deed of trust, and the promissory notes which it secured, were signed by Norvena E. Svensen. Frederick V. Lineker was not a party to the notes nor to the deeds of trust. While said Frederick V. Lineker took said land by virtue of said deed from Norvena E. Lineker, subject to said first deed of trust, there was no relation of debtor or creditor or any other contractual relation between Frederick V. Lineker and Daniel A. McColgan.

On the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and for the County of Alameda, one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen (who became Norvena E. S. Lineker when she married said plaintiff) which judgment was for the sum of $1285.00, together with $15.00 costs. In said [33] action a writ of execution was issued to the Sheriff of the County Stanislaus on the 29th day of July, 1913, directing said Sheriff to satisfy said judgment out of the property of Norvena E. Svensen. Thereafter and in pursuance of said writ of execution, A. S. Dingley, as the Sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon said real property, being the same land described herein and in said first deed of trust, and after giving notice as required by law, said Sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff of said County of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of $1361.20, and said Sheriff of said County of Stanislaus, on said 30th day of August, 1913, issued to said William C. Crittenden his certificate of said sale in accordance with law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of Stanislaus, and there recorded

on the 3d day of September, 1913, in Volume 3 of Certificates of Sale, at page 81 thereof. Thereafter and on the 15th day of July, 1914, Daniel A. McColgan purchased and acquired from said William C. Crittendon, with Daniel A. McColgan's own money, all the right, title and interest of said William C. Crittendon in and to said real property and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan an instrument in writing whereby said William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale and all the right, title and interest of said William C. Crittendon in and to said certificate of sale in and to said real property therein described. Said instrument in writing so executed by William C. Crittendon to said Daniel A. McColgan, was recorded in the office of the County Recorder of said County of [34] Stanislaus on the 2d day of September, 1914, and prior to the sale under said first deed of trust, in Volume 3 of Miscellaneous Records, at page 343 thereof. Thereafter and on said 2d day of September, 1914, and prior to said sale under said first deed of trust, the said Sheriff of the County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of the said writ of execution, the sale thereunder, the issuance of his certificate of sale to William C. Crittendon as aforesaid, the assignment by said William C. Crittendon to Daniel A. McColgan, as aforesaid, and granting, in ac-

cordance with law, and in pursuance of the statute in such cases, made and provided to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had at the time of the levying of said writ of execution, as aforesaid, or on the 2d day of September, 1914, in and to said land, and said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the said County Recorder of the said County of Stanislaus, on the 2d day of September, 1914, in Volume 217 of Deeds at page 143 thereof. Said D. A. McColgan so purchased and acquired from said William C. Crittendon all the right, title and interest of William C. Crittendon in and to said real property and in and to said certificate of sale, for his own use and benefit and with his own money. Said Daniel A. McColgan did not purchase or acquire the said right, title and interest of said William C. Crittendon, in and to said real property or in and to said certificate of sale for the use or benefit of said Frederick V. Lineker or Norvena E. Lineker, or of any person except himself.

In April, 1914, nearly four years after the execution of said first deed of trust and when the earliest note secured thereby was about to outlaw, said Daniel A. McColgan directed said R. McColgan, the trustee in said first deed of trust, to publish and said trustee did publish a notice of sale and proceed to sell said [35] land under the terms of said deed of trust. At that time no part of the principal, secured by said deed of trust, had

been paid and there was a large accumulation of long over-due interest. The sale under said first deed of trust was first set for May 24, 1914.

At that time the said land was subject not only to said first deed of trust, which was the earliest encumbrance, and to said William C. Crittendon's said certificate of purchase, but was subject to certain liens, all subordinate to said first deed of trust, for the aggregate principal sum of $2,380.74, and there was a considerable amount of interest secured by said liens in addition to said principal sum of $2,380.74.

Said Frederick V. Lineker and Norvena E. Lineker and their attorney in and about said transactions, L. V. Dennett, Esq., was afraid, on and prior to said 24th day of May, 1914, that if said land was so sold under the terms of said first deed of trust, one or some of the holders of said liens subsequent to said first deed of trust, would bid for said land at said trustee's sale an amount in excess of the debt then due to said Daniel A. McColgan and secured by said first deed of trust, equal to the amount of said subsequent liens, and that as said Frederick V. Lineker and Norvena E. Lineker had not and could not procure sufficient money to purchase said land at said trustee's sale on May 24, 1914, one or some of the holders of said subsequent liens would thus acquire title to said land for less than its value, and that there would remain in the hands of said R. McColgan, as said trustee, a surplus of money, which after the satisfaction of the indebtedness due and owing to

said Daniel A. McColgan, and secured by said first deed of trust, would be impressed by law with said liens for the amount of $2,380.79 and interest. At the request of said L. V. Dennett, and in order to give said Frederick V. Lineker and Norvena E. Lineker, additional time to procure money for the payment of the indebtedness so due to Daniel A. McColgan, and secured by said [36] first deed of trust, and in order to prevent any of the holders of said subsequent liens from thus, at said trustee's sale, obtaining title to said land, to the detriment of said Frederick V. Lineker and Norvena E. Lineker, the said R. McColgan, as such trustee, postponed the said sale under said deed of trust, from May 24th, 1914, successively to June 1st, 1914, and then to June 15th, 1914, and then to June 30th, 1914, and then to July 23d, 1914, and then to August 6th, 1914, and finally to September 2d, 1914. On none of said dates, prior to September 2d, 1914, did said Frederick V. Lineker or Norvena E. Lineker have, or could they procure, sufficient money to protect the title to said land, as aforesaid, and to outbid such holders of said subsequent liens and to prevent said land from being sold to strangers, nor did said Frederick V. Lineker or Norvena E. Lineker on any of said dates prior to September 2, 1914, have, nor could they, or either of them, procure sufficient money to bid for said land at said trustee's sale, a sum sufficient to satisfy the indebtedness then due to Daniel A. McColgan and secured by said first deed of trust.

On July 21, 1914, forty days before the year's period of redemption expired during which said Frederick V. Lineker could have redeemed the said land from the said execution sale under said judgment in favor of said J. A. Williams against Norvena E. Lineker, the said Daniel A. McColgan purchased, with his own money, and for his own exclusive use and benefit, from said William E. Crittendon, the said certificate of purchase and on August 20, 1914, the said Daniel A. McColgan, as the successor in interest of said William C. Crittendon, became entitled to the deed to said land, from said Sheriff of the County of Stanislaus, by virtue of said writ of execution, no redemption of said land from said execution sale having been made. On the 2d day of September, 1914, and prior to said sale under said first deed of trust, said Sheriff of said County of Stanislaus, executed and delivered his deed [37] conveying said land, by virtue of such execution, to said Daniel A. McColgan and said Daniel A. McColgan thus succeeded to all the rights, title and interest in said land which Frederick V. Lineker or Norvena E. Lineker owned on the said 7th day of August, 1913, the date when said Sheriff levied said execution on said land. Said Daniel A. McColgan, neither prior nor subsequent to the purchase of said certificate of purchase from said William E. Crittendon, made any agreement in writing or otherwise, with said Frederick V. Lineker, or Norvena E, Lineker, or any person representing them, that said Daniel A. McColgan should purchase or acquire said certificate of purchase, and the

rights of said William E. Crittendon, thereunder for the use or benefit of said Frederick V. Lineker or Norvena E. Lineker, and neither said Frederick V. Lineker nor Norvena E. Lineker ever made any agreement or promise to repay to said Daniel A. McColgan the sum which he paid to said William C. Crittendon, with his own money, for said certificate of purchase.

After the delivery of said Sheriff's deed to said Daniel A. McColgan, and after the recordation of said Sheriff's deed, the said sale of said land under said first deed of trust was held on September 2, 1914. On September 2, 1914, and prior to said sale said Daniel A. McColgan had invested and laid out in and about said transactions a sum which, including the indebtedness due and owing to said Daniel A. McColgan and secured by said deed of trust and also the amount which said Daniel A. McColgan had so paid on his own account to said William C. Crittenden for said certificate of purchase, amounted, with interest thereon, to $10,016.00 and said Daniel A. McColgan on said 2d day of September, 1914, at said sale, was prepared and intended to bid for said land at said sale a sum of at least $10,016.00, which represented said Daniel A. McColgan's entire outlay and interest thereon, as aforesaid, and L. V. Dennett was informed of that fact; and said L. V. Dennett, [38] who wished to save the land for said Frederick V. Lineker and Norvena E. Lineker, and who then and there believed it to be worth a sum in excess of $14,000.00, was aware and informed that in order

to prevent one or some of the holders of said liens from purchasing said land at said trustee's sale, it would be necessary for said Frederick V. Lineker or Norvena E. Lineker to bid at said sale at least a sum equal to the said sum of $10,016, representing the total outlay of said Daniel A. McColgan, as aforesaid, and the sum of $2380.00, and interest, representing the amount of said liens which had been imposed on said land subsequent to said first deed of trust.

On the morning of said 2d day of September, 1914, and prior to said sale, the said L. V. Dennett, representing said Norvena E. Lineker and Frederick E. Lineker, decided that it would be necessary, or expedient, for him to bid at least $14,000.00 for said land, in order to secure the title to said land for said Frederick E. Lineker and Norvena E. Lineker. At that time said Frederick V. Lineker and Norvena E. Lineker, by said L. V. Dennett, had made arrangements to borrow the sum of $13,000.00 from Annie Connors upon the security of a deed of trust to be executed upon and after the purchase of said land at said sale, under said first deed of trust, and to be a first encumbrance on said land. Said L. V. Dennett, representing said Frederick V. Lineker and Norvena E. Lineker, as aforesaid, requested said D. A. McColgan to lend to said Frederick V. Lineker and Norvena E. Lineker the sum of $1000.00 so that, by adding it to the $13,000.00 to be borrowed from Annie Connors the said L. V. Dennett would have $14,000.00 for which to pay for said land at said sale in order to prevent

the title to said land from going to a stranger, and said Daniel A. McColgan then and there agreed to lend said $1000.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett decided, prior to said sale, that it would be necessary and expedient [39] to pay to said Annie Connors, six months' interest on said sum of $13,000.00, in advance, and said L. V. Dennett requested said Daniel A. McColgan to lend to said Frederick V. Lineker and Norvena E. Lineker said sum, amounting to $455.00, and said Daniel A. McColgan agreed to lend said sum of $455.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett also at said time informed said Daniel A. McColgan that said Frederick V. Lineker and Norvena E. Lineker desired to borrow from said Daniel A. McColgan, for their personal use, an additional sum of $1000.00, and said Daniel A. McColgan agreed to lend said additional sum of $1000.00 to said Frederick V. Lineker and Norvena E. Lineker. Said L. V. Dennett then and there, and prior to said sale on said September 2, 1914, informed said Daniel A. McColgan that it was the intention of said Frederick V. Lineker and Norvena E. Lineker to purchase said land at said trustee's sale in the name of R. S. Marshall, as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and to have the trustee's deed made to said R. S. Marshall, and to have said R. S. Marshall and his wife Olive H. Marshall, immediately after said sale under said first deed of trust, execute to trustees for said Annie Connors, a deed of trust which would

be a first encumbrance on said land for the benefit and security of said Annie Connors, and to secure the payment to said Annie Connors of said sum of $13,000.00, so to be loaned by said Annie Connors, and to have said R. H. Marshall and Olive H. Marshall, his wife, immediately thereafter execute to trustees for said Daniel A. McColgan a note for $2455.00, representing the aggregate sum which said Daniel A. McColgan had that day agreed to lend to said Frederick V. Lineker and Norvena E. Lineker, and a deed of trust to trustees to be selected by said Daniel A. McColgan as security for the payment of said promissory note for $2455.00. Said Daniel A. McColgan did not object to the arrangement so proposed by L. V. Dennett, as the representative and attorney for said Frederick [40] V. Lineker and Norvena E. Lineker. Thereupon the said trustee, R. McColgan, offered the said land for sale at the time and place designated in the notice of sale, and in accordance with the terms of said first deed of trust. There were a number of competing bids made for said land at said sale and said R. S. Marshall bid for said land at said sale the sum of $14,000.00, which was the highest and best bid and said land was sold by R. McColgan, as said trustee, to R. S. Marshall for the said sum of $14,000.00, and said R. McColgan, as said trustee, then and there executed to said R. S. Marshall a deed conveying and granting said land to said R. S. Marshall, in accordance with the terms of said first deed of trust, for the sum of $14,000.00. Immediately thereafter said R. S. Marshall and Olive H.

Marshall, his wife, at the request of L. V. Dennett as the attorney for said Frederick V. Lineker and Norvena E. Lineker, executed to M. J. Connors and B. M. Lyon, trustees for said Annie Connors, their deed of trust by which they conveyed said land to said trustees as security for the payment to said Annie Connors of the said sum of $13,000.00, so loaned by her, as aforesaid. Immediately thereafter the said R. S. Marshall and Olive H. Marshall, his wife, executed to R. McColgan and Eustace Cullinan, as trustees, their deed of trust, conveying said loan to R. McColgan and Eustace Cullinan as trustees, as security for the payment to said Daniel A. McColgan of said sum of $2,455.00, which had that day been loaned and advanced by said Daniel A. McColgan to said R. S. Marshall, as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and evidenced by the promissory note of said R. S. Marshall and Olive H. Marshall, his wife, for $2,455.00, which was then and there executed to said Daniel A. McColgan. Said deed of trust to R. McColgan and Eustace Cullinan, as such trustees, is herein designated as the second deed of trust. Said Daniel A. McColgan designated said Eustace Cullinan as one of said trustees without consulting said Eustace Cullinan or without the knowledge [41] of said Eustace Cullinan, and said Eustace Cullinan was not, on or prior to said 2d day of September, 1914, informed or aware of the particulars of any of the transactions hereinbefore mentioned.

Thereafter, on the 22d day of January, 1917, on the demand of said Daniel A. McColgan, and in accordance with the terms of said second deed of trust, said R. McColgan and Eustace Cullinan, as trustees in said second deed of trust, offered said land for sale, and sold same, subject to said deed of trust for the benefit and security of said Annie Connors, as aforesaid. E. C. Peck, on said 22d day of January, 1917, at said sale under said second deed of trust, bid and offered for said land the sum of $4,195.79, which was then the amount of indebtedness due, owing and unpaid to said Daniel A. McColgan from said R. S. Marshall and Olive H. Marshall, his wife, under the terms of said second deed of trust and the repayment of which was secured by said second deed of trust; and said E. C. Peck was the highest and best bidder of said sale and said R. McColgan and Eustace Cullinan, as such trustees, on said 22d day of January, 1917, sold such real property, subject to said deed of trust for the benefit and security of said Annie Connor, to said E. C. Peck, for the said sum of $4,195.79 and executed on said date their deed as such trustees, in accordance with the terms of said second deed of trust, by which they conveyed and granted to said E. C. Peck the said land for said sum of $4,195.79, and said R. McColgan, one of said trustees, received the said sum of $4,195.79 from said E. C. Peck and paid and delivered the same to said Daniel A. McColgan in satisfaction of the indebtedness so secured by said second deed of trust.

Said R. McColgan, trustee in said first deed of trust, after said sale paid to said Daniel A. McColgan said entire sum of $14,000.00.

Said defendants are informed and believe and on such information and belief allege that none of said liens for the [42] aggregate principal sum of $2380.00 has been satisfied or released except as they may have been released from said land by said sale under said first deed of trust.

All of the surplus of said sum of $4,000.00, after the payment and satisfaction of the indebtedness due and owing to said Daniel A. McColgan from Norvena E. Lineker and secured by said first deed of trust, belonged to said Daniel A. McColgan, as the successor in interest of said William C. Crittendon, as aforesaid, and if said surplus had not so gone and belonged to said Daniel A. McColgan it would have gone and belonged to said William C. Crittendon, but not to said Frederick V. Lineker or said Norvena E. Lineker. [43]

XV.

SECOND SPECIAL DEFENSE—AN ACCOUNT STATED.

And as a further separate answer and defense defendants allege that on the 2d day of September, 1914, and at the time of the execution of said deed of trust of that date, to wit, said second deed of trust, an account was stated between said Daniel A. McColgan, as creditor, and said Frederick V. Lineker and Norvena E. Lineker, and each of them as debtors, respecting all sums due or owing to said Daniel A. McColgan under said first deed of trust, and all

offsets thereto, and all sums loaned by said Daniel A. McColgan to Frederick V. Lineker or Norvena E. Lineker or R. S. Marshall as the agent or trustee of either or both of them, prior to or on said 2d day of September, 1914, and respecting all transactions referred to in plaintiffs' amended bill of complaint herein, or in this answer, as having occurred on or prior to September 2d, 1914, and it was then and there agreed and determined by and between said Daniel A. McColgan, on the one hand, and said Frederick V. Lineker and Norvena E. Lineker, on the other hand, that there was then a balance due, owing and unpaid from Frederick V. Lineker and Norvena E. Lineker or either of them to Daniel A. McColgan of $2,455.00, and a promissory note for $2,455.00, payable to Daniel A. McColgan and said second deed of trust, securing the payment of the same, were then and there at the request of said Frederick V. Lineker and Norvena E. Lineker, executed by R. S. Marshall as agent and trustee for said Frederick V. Lineker and Norvena E. Lineker, and as evidence of said indebtedness and of the balance so found due, owing and unpaid to said Daniel A. McColgan on the said statement of said account; and said Frederick V. Lineker and Norvena E. Lineker, and each of them, are now barred and estopped, by reason of the foregoing facts and of the stating of said account as aforesaid, from denying or disputing that on said 2d day of September, 1914, there was due, owing and unpaid from said Frederick V. Lineker and

Norvena E. Lineker, or either of them, to said Daniel A. McColgan said sum of $2,455.00. [44]

XVI.

THIRD SPECIAL DEFENSE—A FORMER ADJUDICATION.

And for a further and separate answer and defense, and as a plea in bar to the maintenance of this suit by plaintiffs, said defendants allege the following facts:

Prior to the 22d day of January, 1917, when said R. McColgan and Eustace Cullinan, as trustees under said deed of trust dated September 2, 1914, sold said land, but after notice of such intended sale had been given and published by said trustees in accordance with the terms of said deed of trust, the said R. S. Marshall and Olive H. Marshall, who were the makers of said promissory note for $2,455.00 dated September 2d, 1914, and the grantors in said second deed of trust, securing the same, said Marshall being the agent, trustee, representative and privy of said Frederick V. Lineker and Norvena E. Lineker, as aforesaid, commenced, on December 3, 1916, an action in the Superior Court of the State of California, in and for the County of Stanislaus, against said Daniel A. McColgan and said R. McColgan and Eustace Cullinan, as such trustees, which action was entitled "R. S. Marshall and Olive H. Marshall, Plaintiffs, vs. Daniel A. McColgan, R. McColgan and Eustace Cullinan, as defendants," and was numbered 5353 on the files of said Superior Court.

In the complaint which said R. S. Marshall and Olive H. Marshall filed in said action they alleged the execution of said note for $2455.00, dated September 2, 1914, and said second deed of trust securing payment of the same; alleged that said R. McColgan and Eustace Cullinan, as such trustees, had given notice by publication that they would sell said real property, under the terms of said second deed of trust; alleged that said Daniel A. McColgan claimed that there was then due, owing and unpaid under the terms of said deed of trust a sum in excess of $4,000.00, and alleged that there was not due to said defendants in said action numbered 5353 a sum in excess of $2,200.00, and said R. S. Marshall [45] and Olive H. Marshall in their complaint in said action numbered 5353 alleged that they were ready, able and willing to pay all sums due to said Daniel A. McColgan as soon as they should be determined by said Superior Court, and prayed that said Daniel A. McColgan be required to account to said R. S. Marshall and Olive H. Marshall, for the application of said sum of $2,455.00 and for all his dealings and transactions in reference to said sum of $2,455.00, and that defendants in said action be restrained and enjoined from proceeding with said sale under the terms of said second deed of trust until the final judgment and decree should be entered in said action, and for such other and further relief as to the Court should seem meet. On the application of R. S. Marshall and Olive H. Marshall, plaintiffs in said action numbered 5353 the said Superior Court issued an order so restrain-

ing said defendants from so proceeding with said sale, which restraining order remained in force and effect until final judgment was rendered and entered in said action as hereinafter set forth. In said action numbered 5353 said Daniel A. McColgan and said R. McColgan and Eustace Cullinan filed their answer in which they alleged that there was due, owing and unpaid to said Daniel A. McColgan and secured by said deed of trust dated September 2, 1914, a sum in excess of $4,820.21. Said action was tried on the merits on the 8th day of December, 1916, on the issues joined by said complaint and answer, and the principal question of law or fact litigated at said trial was the determination of the amount which was due, owing and unpaid from said R. S. Marshall and Olive H. Marshall to Daniel A. McColgan and secured by said deed of trust dated September 2, 1914. After taking evidence from both sides at the trial of said action, and after said Daniel A. McColgan had rendered therein a complete account concerning the sums due, owing and unpaid to him and secured by said deed of trust of September 2, 1914, the said Superior Court (by the Honorable [46] L. W. Fulkerth, Judge thereof) duly gave, made and entered its judgment (findings of fact having been waived by the parties) in which said Court adjudged that Daniel A. McColgan have and recover from R. S. Marshall and Olive H. Marshall the sum of $4,110.01, together with interest on $3,949.51 of said sum at the rate of one per cent per month from December 6, 1916, and adjudged further that the payment of said

amount was secured by said second deed of trust, and that unless said amount be paid to said Daniel A. McColgan by said R. S. Marshall and Olive H. Marshall, the trustees, to wit, said R. McColgan and Eustace Cullinan, in said second deed of trust may proceed with the sale of said premises described in said second deed of trust and shall, upon the sale thereof being made, deduct from the proceeds of such sale the sum of $4,110.01, together with interest on $3,949.51 as aforesaid. Said judgment was not satisfied prior to the sale which occurred January 22, 1914, as hereinafter set forth.

On the 22d day of January, 1917, said R. McColgan and Eustace Cullinan, as such trustees, sold and conveyed said real property (subject to a deed of trust securing the payment of $13,000.00 to one Annie Connors) under and in accordance with the terms of said second deed of trust and of said judgment to said E. C. Peck for the sum of $4,195.79, which was the precise sum then due, owing and unpaid on the debt secured by said deed of trust, as determined by said judgment, and said R. McColgan, one of such trustees, received said sum and paid said sum of $4,195.79 to said Daniel A. McColgan.

No appeal was taken from said judgment and said judgment so given, made and entered in said action numbered 5353 has become final and has been fully satisfied by said sale and the payment of said sum to said Daniel A. McColgan. Said action was so commenced and prosecuted by said R. S. Marshall and Olive H. [47] Marshall as the trustees and agents of, and for the benefit of, said Frederick V.

Lineker and Norvena E. Lineker, and said Frederick V. Lineker and said Norvena E. Lineker, were privies to said action and judgment and are, and each of them is, barred and estopped by said judgment so given, made and entered in said action numbered 5353 from maintaining this action against any of the defendants herein and especially against the defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and in particular are barred and estopped by said judgment from maintaining or asserting in this suit or elsewhere that the sum specified in said judgment was not so due, owing and unpaid to Daniel A. McColgan at the time of the rendition of said judgment and on the 22d day of January, 1917, at the time of such sale. [48]

XVII.

FOURTH SPECIAL DEFENSE—ANOTHER ACTION PENDING.

And as a further and separate answer and defense to said action and as a plea in abatement and estoppel thereto, said defendants allege the following facts:

Prior to the 22d day of January, 1917, when said R. McColgan and Eustace Cullinan, as trustees under said deed of trust dated September 2, 1914, and herein called the second deed of trust, sold said land as aforesaid, but after notice of such intended sale had been given and published by said trustees, in accordance with the terms of said second deed of trust, said Frederick V. Lineker, who is also called Fred V. Lineker, on the 27th day of November, 1916, commenced in the Superior Court of the

State of California in and for the County of Stanislaus, an action which was numbered 5433 on the files of said court. A copy of said Frederick V. Lineker's complaint in said action is annexed hereto, marked Exhibit "A" and made a part hereof.

Defendants D. A. McColgan, R. McColgan and Eustace Cullinan filed in said action their answer. A copy of said answer is annexed hereto, marked Exhibit "B" and made a part hereof.

Said action was thereafter and before the trial thereof dismissed as against said R. S. Marshall and Olive H. Marshal, his wife, by the plaintiff therein. Thereafter said action came on regularly for trial before the said Superior Court of the State of California, in and for the County of Stanislaus, in Department Number 2 thereof, before Honorable William H. Langdon, Judge thereof, on the issues joined therein by said complaint and by the answer thereto of said defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and evidence was heard and the matter submitted and on the 2d day of March, 1917, said Superior Court made and filed its findings of fact and conclusions of law and gave, made and entered judgment thereon in favor of defendants Daniel A. McColgan, R. McColgan and Eustace [49] Cullinan, and against the said Frederick V. Lineker.

Thereafter, after proceedings duly and regularly had in that behalf, the said Superior Court of the State of California, in and for the County of Stanislaus, on motion of said Frederick V. Lineker on

the 6th day of June, 1917, gave, made and entered an order that a new trial of said action be granted.

Thereafter, the said action came on again regularly for such new and second trial and was tried on or about the 20th day of September, 1917, before the said Superior Court, Department Number 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, and subsequent days until completed, and evidence having been introduced by all parties and the cause submitted the said Superior Court, on the 30th day of April, 1918, in said action, gave, made and entered its findings of fact and conclusions of law, a copy of which is annexed hereto, marked Exhibit "C" and made a part hereof, and thereafter, on said 30th day of April, 1918, said Superior Court in said action gave, made and entered its judgment therein, a copy of which judgment is annexed hereto, marked Exhibit "D," and made a part hereof.

Thereafter, the said Frederick V. Lineker took an appeal from said judgment so given, made and entered in said action to the Supreme Court of the State of California, and said appeal is now pending and undecided in said Supreme Court of the State of California.

Said Fred V. Lineker commenced and prosecuted said action and now maintains the same in his own interest and also as the assignee, representative, agent and trustee of his said wife, Norvena Lineker, and for her benefit and said Norvena Lineker was and is privy to said action numbered 5344.

Plaintiffs in this suit are barred and estopped by the pendency of said action numbered 5344 from maintaining or proceeding with this suit in this court and this suit ought to be abated and stopped until the final determination of said action numbered 5344. [50]

In said action numbered 5344 said Frederick V. Lineker appeared and acted as the successor in interest of Norvena Lineker and the identical issues of fact and of law were involved and litigated and determined between Norvena Lineker and Frederick V. Lineker, on the one part, and Daniel A. McColgan, R. McColgan and Eustace Cullinan, on the other part, that are tendered and involved in this action in which this answer is filed, including especially but not exclusively the questions (a) whether any portion of said sum of $14,000.00, so paid by R. S. Marshall for said land at said sale held on September 2, 1914, under said first deed of trust, is or was due or owing to, or held in trust for, said Norvena Lineker or Frederick V. Lineker, and (b) whether said Daniel A. McColgan purchased and acquired said certificate of purchase from W. C. Crittendon and subsequently took and acquired the title to said land under said Sheriff's deed in trust for Norvena Lineker, or Frederick V. Lineker or for his own use and benefit, (c) whether said sum of $2,455.00 was actually so loaned by Daniel A. McColgan to R. S. Marshall and Olive H. Marshall, and secured by said second deed of trust and whether said R. S. Marshall in that transaction acted as the agent and trustee for said Frederick

V. Lineker and whether said Frederick V. Lineker actually received the use and benefit of said sum of $2,455.00 so loaned and whether the execution of said second deed of trust was a *bona fide* transaction and (d) whether the execution of said promissory note for $2,455.00 on September 2, 1914, by R. S. Marshall and Olive H. Marshall, his wife, as the agent and representative of Frederick V. Lineker, was an account stated between Frederick V. Lineker and Daniel A. McColgan as of that date, of all debts and financial transactions between them. [51]

XVIII.

FIFTH SPECIAL DEFENSE — RATIFICATION.

As a further and separate answer and defense to said action the said defendants allege that since the 22d day of January, 1917, when said sale was so made under said second deed of trust, the said Frederick V. Lineker and Norvena Lineker have ratified and confirmed the said sale so made on the 22d day of January, 1917, under said second deed of trust, and have ratified and confirmed the said sale made by said R. McColgan as such trustee under said first deed of trust on the 2d day of September, 1914, as aforesaid and have ratified and confirmed the said account so stated as aforesaid by the said Daniel A. McColgan on the one hand and said Frederick V. Lineker and Norvena Lineker on the other hand, on the said 2d day of September, 1914. [52]

XIX.

SIXTH SPECIAL DEFENSE—RATIFICATION, INDEMNIFICATION, AND ELECTION OF ANOTHER REMEDY.

And for a further and separate answer and defense to said action the said defendants allege that on or about the 30th day of October, 1918, said Norvena Lineker and Frederick V. Lineker commenced an action in the said Southern Division of the United States District Court for the Northern District of California, Second Division, in which said Norvena Lineker and Frederick V. Lineker were plaintiffs and one Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon were defendants, which action was an action at law and is numbered 16195 on the files of said court; that in their complaint in said action numbered 16195 said Norvena Lineker and Frederick V. Lineker alleged, among other things, the execution by said Norvena Lineker (then Norvena Svensen) on or about the 20th day of June, 1910, of said first deed of trust; alleged that said note of $2850.00 representing the said original sum borrowed from said Daniel A. McColgan and secured by said first deed of trust was executed by said Norvena Lineker and said money was so borrowed by Norvena Lineker at the request of said Mary J. Dillon and her son William Winter and that the said sum of $2850.00 was on the said 20th day of June, 1910, immediately turned over by said Norvena Lineker to said William Winter for the use and benefit of said defendant Mary J. Dillon who received the

whole amount thereof; alleged that before said Norvena Lineker so borrowed said money or executed said first deed of trust the said William Winter, at the direction and suggestion of and in conspiracy with said Mary J. Dillon, stated and promised to said Norvena Lineker (then Norvena Svensen) that they would pay off all money so borrowed from said Daniel A. McColgan and satisfy such debt to said Daniel A. McColgan and that they would save her, the said Norvena Lineker, harmless from any loss or damage in connection therewith; alleged that said [53] Norvena Lineker borrowed said sum of $2850.00 and executed said first deed of trust in reliance upon such statements and representations to her; and it is further alleged by said Norvena Lineker and Frederick V. Lineker in their complaint in said action numbered 16195 that on or about the 22d day of April, 1911 said Daniel A. McColgan demanded of said Norvena Lineker that she forthwith pay to him the amount of said promissory note of $2850.00 and interest thereon and then told her that if she failed to do so he would cause her interest in said property to be sold; and it was further alleged in said complaint in said action numbered 16195 that immediately after the said Daniel A. McColgan so demanded the payment of said note the said Norvena Lineker went to see the said Mary J. Dillon and demanded of her that she immediately pay and satisfy said note and interest and procure the satisfaction and cancellation of said trust deed, to wit said first deed of trust, and that the said Norvena Lineker

then and there told said Mary J. Dillon that if she, said Mary J. Dillon, failed to pay and satisfy said note forthwith and cause said trust deed to be satisfied and discharged, she, said Norvena Lineker, would immediately bring action against the said Mary J. Dillon and her son William Winter to recover the amount of said note; and it was further alleged in said complaint in said action numbered 16195 that thereupon the said Mary J. Dillon asked and importuned said Norvena Lineker not to begin or prosecute any action against the said Mary J. Dillon or her son William Winter to recover said money borrowed on said note from Daniel A. McColgan and secured by said trust deed; and it was further alleged in said complaint in said action numbered 16195 that the said Mary J. Dillon did then and there promise and agree to and with the said Norvena Lineker, that if she, the said Norvena Lineker, would refrain from instituting or prosecuting any action against said Mary J. Dillon, or said William Winter, concerning said money secured by said trust [54] deed, the said Mary J. Dillon would hold and save the said Norvena Lineker harmless from any and all loss or damage by reason of the making of said note or said trust deed and that the said Mary J. Dillon would cause said debt and interest to be paid and discharged and would procure said trust deed to be paid and satisfied, and would indemnify and save harmless the said Norvena Lineker from any loss or damage whatsoever in connection with said note and trust deed; and it was further alleged in said

complaint in said action numbered 16195 that relying upon said Mary J. Dillon's promises to save here harmless from any and all loss as aforesaid the said Norvena Lineker refrained from bringing any action to recover such money from said Mary J. Dillon or her son William Winter, or either of them, and had not since commenced or prosecuted such action; and it was further alleged in said complaint in said action numbered 16195 that thereafter the said Daniel A. McColgan took various proceedings under the said trust deed for the purpose of obtaining the money secured thereby and large expense was incurred in connection therewith; that several adjournments of the sale of said property under said trust deed were had from time to time and further expense thereby incurred and further expenses for attorneys' fees and the like were incurred by the said Norvena Lineker in an endeavor to prevent the sale of said property and a loss thereof to said Norvena Lineker, and that the said Daniel A. McColgan caused said property to be sold under said trust deed, and various other proceedings were had and taken by and on behalf of the said Daniel A. McColgan which resulted in said Norvena Lineker being deprived of possession of said land and of her interest therein and of the rents, issues and profits thereof to her loss and damage in the sum of $35,000.00; and it was further alleged in said complaint in said action numbered 16195 that the said Mary J. Dillon failed and neglected to pay off said indebtedness incurred for her use and

[55] benefit and failed and neglected to pay off said note or the interest accumulated thereon and failed to pay and satisfy said trust deed, and that said Mary J. Dillon had failed to hold or save the said Norvena Lineker harmless from any or all loss caused to or incurred by said Norvena Lineker in connection with said note and trust deed made by Norvena Lineker in favor of said Daniel A. McColgan to the loss and damage of said Norvena Lineker in the sum of $35,000.00, and said defendants herein, to wit, said Daniel A. McColgan, R. McColgan and Eustace Cullinan, further allege that said Mary J. Dillon and Thomas B. Dillon, defendants in said action numbered 16195 filed an answer therein denying said agreement and denying that said Norvena Lineker had been damaged in the sum of $35,000.00 or in any sum as a result of the matters set forth in said complaint in said action numbered 16195; that thereafter a trial of said action numbered 16195 was had in said Court before a jury and the plaintiffs therein proved by evidence the sale of said land to R. S. Marshall under said first deed of trust on September 2, 1914, as aforesaid, the execution of said second deed of trust by said R. S. Marshall, the sale under said second deed of trust on January 22, 1917, as in this answer heretofore set forth, and proved that they had lost said land described in said deeds of trust, the same being the said land described in plaintiff's amended bill of complaint herein, and the rents, issues and profits thereof by virtue of said sale so held on January 22, 1917, under said second

deed of trust dated September 2, 1914, which had followed as a consequence upon the said sale under said first deed of trust and the execution of said second deed of trust as in this answer heretofore set forth, and that said sale under said second deed of trust was one of the various proceedings referred to in the complaint in said action numbered 16195 had and taken by or on behalf of said Daniel A. McColgan; and said Norvena Lineker and Frederick V. Lineker further [56] proved in said action numbered 16195 that said Norvena Lineker and Frederick V. Lineker were finally deprived of the title of said land, and of the said land, by said sale under said second deed of trust and that said sale under said second deed of trust was a proximate consequence and result of the failure of said Mary J. Dillon to pay said money that was so borrowed and secured by said first deed of trust as and in the complaint in said action numbered 16195 set forth; that in said action numbered 16195 the principal element of damage asserted by said Norvena Lineker and Frederick V. Lineker in said action numbered 16195 against said Mary J. Dillon was the value of said land of which said Norvena Lineker and Frederick V. Lineker were so deprived by said sale under said second deed of trust and in said action said Norvena Lineker and Frederick V. Lineker introduced evidence to prove the value of said land as an element of their damage for the breach of said indemnity contract so alleged to have been made by said Mary J. Dillon; and in said action num-

bered 16195 the Court instructed the jury that on the question of damages, should they see fit to find for the plaintiff in said action, they should take into consideration all the evidence in the case as to what the plaintiff's property was called upon to pay, what its value was, because she had lost it entirely so far as any evidence before said jury was concerned, and that, should they find that Mary J. Dillon had made the indemnity contract alleged in the complaint in said action numbered 16195, the said Mary J. Dillon was liable for everything that had been proximately lost through her failure to keep said contract to hold said Norvena Lineker harmless, and said Court instructed the jury in said action numbered 16195 that the damages which Norvena Lineker and Frederick V. Lineker in said action were entitled to recover from said Mary J. Dillon covered everything that had been lost to said Norvena Lineker and Frederick V. Lineker as shown by the evidence [57] in said action and it would be in law a proximate loss arising from the creating of the said original obligation uncared for, and that whatever the value of the property was that had been lost to said Norvena Lineker and Frederick V. Lineker would in law be a proximate loss resulting from the original transaction between said Norvena E. Lineker and Daniel A. McColgan concerning which said Mary J. Dillon had made such contract of indemnity and at the conclusion of the trial of said action numbered 16195 and on or about the 3d day of October, 1919, the jury in said action rendered a verdict in favor of

said Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon for $32,000.00 damages sustained by the said Norvena Lineker by reason of the loss by her of said land as aforesaid; that thereafter, and on the 3d day of October, 1919, judgment was entered in said action numbered 16195 in favor of Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon for $32,000.00 and $131.75 costs; that thereafter on January 5, 1920, the said Southern Division of the United States District Court of the Northern District of California, Second Division, by the Honorable William H. Van Fleet, Judge thereof, gave, made and entered its order that said judgment be modified so that it shall be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thomas B. Dillon, and that the petition then pending of said defendants in said action numbered 16195 for a new trial thereof be granted unless the plaintiffs therein within ten days consent to a remission of the sum of $4000.00 from the amount of said judgment so that the amount of said judgment should be in the sum of $28,000.00 and for costs, and thereupon the said plaintiffs in said action numbered 16195, in open court, by their attorney duly consented to the reduction of the judgment therein in the [58] sum of $4000.00, and such remission being accepted by the Court it was thereupon ordered that the petition of defendants in said action for a new trial be and the same was denied and that judgment be entered

accordingly as of the date of said verdict, and thereafter on said 5th day of January, 1920, judgment was duly entered in said action nunc pro tunc as of the 3d day of October, 1919, in favor of said Norvena Lineker and Frederick V. Lineker and against said Mary J. Dillon and Thomas B. Dillon in accordance with the order of said Court for the sum of $28,000 and costs, and defendants herein are informed and believe and upon such information and belief allege that the said Norvena Lineker and Frederick V. Lineker have collected in partial satisfaction of said judgment the sum of $24,126.19; and defendants further allege that by commencing said action, and prosecuting the same to judgment and collecting such amount on such judgment the said defendants elected to ratify and confirm and they did ratify and confirm the said sale under said first deed of trust and the said sale under said second deed of trust and they waived and abandoned all right to have either of said sales set aside and they waived and abandoned all right to any further accounting from said Daniel A. McColgan for any of the transactions set forth in plaintiff's amended bill of complaint herein, and said judgment for $28,000.00 and costs is a full satisfaction and compensation and reimbursement of said Norvena Lineker and Frederick V. Lineker for all loss and damage suffered by them, or all or any money that might be due them from any of the defendants in this action by reason of any of the transactions referred to in said amended bill of complaint; and defendants further

allege that said sum of $28,000.00 is equal to and in excess of the value of said land, and exceeds the amount of all loss that said Frederick V. Lineker or Norvena E. Lineker has suffered by reason of any of the sales or transactions referred to in said amended bill of complaint herein. [59]

XX.

SEVENTH SPECIAL DEFENSE—LACHES.

And for a further and separate answer and defense said defendants allege that said plaintiffs have been guilty of laches, in and about the commencement of said action, and in and about the filing of their amended bill of complaint herein, in this, that they have neglected and delayed for an unreasonable and inequitable length of time the commencement of said action and the filing of their amended bill of complaint therein, and have allowed each and every one of the causes of action set forth in said amended bill of complaint to become barred and the same are barred by the provisions of sections 339 and 338 and 337 and 336 of the Code of Civil Procedure of the State of California; that more than five years elapsed after said sale under said first deed of trust, and more than three years elapsed after said plaintiffs had become informed and aware that said Daniel A. McColgan claimed said surplus of said $14,000.00 for himself, and for his own use and benefit, before said amended bill of complaint herein was filed herein; that the original complaint filed herein by plaintiffs set forth a cause of action to quiet title to said land, and sought no other relief; that

the causes of action for an accounting set forth in said amended bill of complaint were not mentioned in said original complaint and were first set forth in said amended bill of complaint; that the demand of plaintiffs for such accounting is, and at the time of the filing of said amended bill of complaint herein was stale and inequitable; and that plaintiffs have negligently delayed pleading each and every cause of action set forth in said amended bill of complaint beyond the period prescribed by the Statutes of Limitation of the State of California, and particularly sections 336, 337, 338 and 339 of the Code of Civil Procedure of the State of California within which actions on such respective causes of action could have been commenced, and that by reason of the [60] foregoing it would be unreasonable and inequitable for this court now to allow plaintiffs any of the relief which they are seeking against these defendants in this suit.

WHEREFORE, said defendants pray that plaintiffs take nothing by their suit, that this suit be abaited, and that said defendants have judgment against plaintiffs for their costs and for such other relief as may seem to the Court equitable.

CULLINAN & HICKEY,

Attorneys for Defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan.

State of California,
City and County of San Francisco,—ss.

Daniel A. McColgan, being first duly sworn, deposes and says: that he is one of the defendants

in the above-entitled action and makes this affidavit on behalf of himself and of the defendants R. McColgan and Eustace Cullinan; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on his information and belief and as to those matters he believes it to be true.

DANIEL A. McCOLGAN.

Subscribed and sworn to before me this 26th day of March, 1920.

[Seal] E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California. [61]

Exhibit "A."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN and R. R. MARSHALL, and OLIVE H. MARSHALL, His Wife,

Defendants.

COMPLAINT.

Comes now plaintiff above named, and complains of defendants above named, and for cause of action alleges:

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one, Norvena E. S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situate in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

> All that portion of the Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

That said real property was on the 6th day of August, 1915, and had been for some time prior thereto, subject to a life interest therein in favor of Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915; that thereafter proceedings were duly had and taken wherein and whereby the life estate of said Ole Svensen was thereby terminated, and the above-entitled court duly made and entered its decree terminating said life estate.

That said real property is the same real property [62] which was conveyed by defendant, R. S. Marshall, to defendants, R. McColgan and Eustace Cullinan, in the manner hereinafter alleged.

That on the 22d day of September, 1912, Norvena E. Svensen and Fred V. Lineker, plaintiff herein, intermarried, and ever since the said 22d day of

September, 1912, they have been and are now husband and wife.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to plaintiff herein; that said conveyance was recorded in the office of the County Recorder of Stanislaus County on July 27, 1914, in volume 193 of Deeds at page 590 thereof, records of said County of Stanislaus.

II.

That at the time plaintiff acquired said real property the same was subject to an encumbrance thereon consisting of an indenture in writing, or Deed of Trust, made, executed and delivered on June 20, 1910, by said Norvena E. S. Lineker to said defendant, Robert McColgan, as trustee for said defendant, Daniel A. McColgan, to secure the payment by her of a promissory note in the sum of $2,850.00, made payable to said defendant, Daniel A. McColgan, by said Norvena E. S. Lineker.

That on or about the 23d day of April, 1914, as plaintiff is informed and believes and therefore alleges, said defendant, Daniel A. McColgan, caused said defendant, R. McColgan, who is the trustee named in said last-mentioned Deed of Trust, to sell at public auction the real property therein described, for the reason that said Norvena E. S. Lineker had, at that time, failed to perform certain of the terms and conditions in said Deed of Trust contained, and on her part to be kept and performed. That thereupon, said defendant, Robert McColgan, caused notice to [63] be given in ac-

cordance with the terms of said Deed of Trust, that he would, on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said Deed of Trust, and being the same real property hereinbefore described. That said sale was postponed from time to time from said May 25, 1914, until the 2d day of September, 1914, on which day said sale was held, and said real property was sold thereat by said defendant, Robert McColgan, as such trustee, to said defendant, R. S. Marshall, pursuant to the agreement by and between said plaintiff and said defendant, Daniel A. McColgan, and in the manner hereinafter alleged.

III.

That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused

to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said [64] Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000.00 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.

IV.

That at the time of said agreement last aforesaid, said defendant, Daniel A. McColgan, knew the plaintiff was not possessed of said sum of $10,000.00, but that one, Annie Connors had agreed to loan plaintiff upon his promissory note the sum of $13,000.00, to be used by plaintiff in purchasing

cordance with the terms of said Deed of Trust, that he would, on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said Deed of Trust, and being the same real property hereinbefore described. That said sale was postponed from time to time from said May 25, 1914, until the 2d day of September, 1914, on which day said sale was held, and said real property was sold thereat by said defendant, Robert McColgan, as such trustee, to said defendant, R. S. Marshall, pursuant to the agreement by and between said plaintiff and said defendant, Daniel A. McColgan, and in the manner hereinafter alleged.

III.

That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused

to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of $10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said [64] Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of $10,000.00 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.

IV.

That at the time of said agreement last aforesaid, said defendant, Daniel A. McColgan, knew the plaintiff was not possessed of said sum of $10,000.00, but that one, Annie Connors had agreed to loan plaintiff upon his promissory note the sum of $13,000.00, to be used by plaintiff in purchasing

said real property at said sale, and that the payment of said last-mentioned note was to be secured thereafter by an indenture in writing, wherein and whereby plaintiff, when he had acquired title thereto, was to convey said real property to said Annie Connors in trust for the purpose last aforesaid.

That thereafter and prior to said sale it was agreed between plaintiff and said defendant, Daniel A. McColgan, that for the purpose of securing said defendant, Daniel A. McColgan, in the event that he should be made to pay any of the liens [65] alleged to be subsisting against said real property, and which were not secured by the Deed of Trust first hereinbefore mentioned, that plaintiff would execute and deliver to said defendant, Daniel A. McColgan, his promissory note in the sum of $2,455.00, and that plaintiff, in order to secure the payment of said last-mentioned note, would execute and deliver to said defendant, Daniel A. McColgan, an indenture in writing wherein and whereby he would convey said real property, when he had acquired the title thereto, to said defendant, Daniel A. McColgan, in trust, for the purpose last aforesaid, but upon the condition that said last-mentioned Deed of Trust would be subject and subordinate to the Deed of Trust to be delivered to said Annie Connors as aforesaid.

V.

That on the 11th day of June, 1913, in an action pending in the Superior Court of the State of California, in and for the County of Alameda, one,

J. A. Williams, plaintiff therein, recovered a judgment against Norvena E. Svensen for the sum of $1,285.00, together with $15.00 costs; that in said action a writ of execution was issued to the Sheriff of said Stanislaus County on the 29th day of July, 1913, directing said Sheriff of the County of Stanislaus to satisfy judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as said Sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property hereinbefore described and being the same real property described in said deed of trust, and after giving notice as required by law, said Sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff [66] of said County of Stanislaus sold said land to one, William C. Crittendon, who was the highest bidder thereat, for the sum of $1,361.20, and said Sheriff of said County of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of Stanislaus, and there recorded on the 3d day of September 1913, in volume 3 of Certificate of Sale, at page 81 thereof. That thereafter, and prior to the purchase hereinafter alleged to have been made, plaintiff and said defendant, Daniel A. McColgan,

entered into an agreement wherein and whereby they agreed that said Daniel A. McColgan was to purchase for the use and benefit of plaintiff from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and to repay himself for the moneys thus expended by him out of the moneys coming into his hands from said trustee at said trustee's sale. And it was also further agreed and understood by and between plaintiff and said defendant, Daniel A. McColgan, that the sum of $10,000.00 herein first mentioned would be sufficient to cover the sum which would be expended by defendant, Daniel A. McColgan, in the purchase of said Judgment and certificate of sale.

That thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan, in accordance with his agreement and understanding had with plaintiff, purchased for the use and benefit of plaintiff from said William C. Crittendon all the right, title and interest of said William C. Crittendon and in and to said real property, and in and to said certificate of sale, and said William C. Crittendon, on the 15th day of July, 1914, [67] executed to said Daniel A. McColgan an instrument in writing whereby said William C. Crittendon granted, sold, and assigned to Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described. That said instrument in writ-

ing, executed by said William C. Crittendon to said Defendant, Daniel A. McColgan, was recorded in the office of the County Recorder of said County of Stanislaus, at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneous, at page 343 thereof. That thereafter, and on the 2d day of September, 1914, the said W. S. Dingley, as Sheriff of said County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Crittendon, as aforesaid, the assignment by said William C. Crittendon to said Daniel A. McColgan, as aforesaid, and granting, in accordance with law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had on the said 30th day of August, 1913, or at any time afterwards, or on said 2d day of September, 1914, had in and to said land. That said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the County Recorder of said County of Stanislaus at thirteen minutes past two o'clock P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

That in the purchase of said judgment and certificate of sale last as aforesaid said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement with plaintiff to that end, and also that said purchase

last [68] aforesaid was made by said defendant, Daniel A. McColgan, for the use and benefit of plaintiff.

VI.

That after the agreement made and entered into by and between said defendant, Daniel A. McColgan, and plaintiff, and prior to the sale of the said real property as hereinafter alleged, plaintiff and defendant, R. S. Marshall, made and entered into an agreement wherein and whereby it was understood and agreed that said defendant, R. S. Marshall, should attend said sale, and purchase thereat for plaintiff the said real property hereinbefore described, and should bid thereat the sum of $15,455.00, or thereabouts for said real property; and that it was further agreed between the parties last aforesaid that said R. S. Marshall and Olive H. Marshall, his wife, should make, execute and deliver, as and for the act and deed of plaintiff, and at the special instance and request of plaintiff, the two promissory notes for the respective sums of $13,000.00 and $2,455.00, and the payment of which was to be secured in the manner aforesaid.

That thereupon, said defendant, R. S. Marshall, proceeded to carry out the terms of said agreement, and attended said sale on September 2, 1914, and bid thereat the sum of $14,000.00 for said real property, and thereupon said defendant, Robert McColgan, as such trustee, sold said real property to said defendant, R. S. Marshall, who paid therefor to said Robert McColgan as such trustee the said sum of $14,000.00 all in accordance with the understand-

ing and agreement had between said R. S. Marshall and plaintiff as aforesaid.

That plaintiff is informed and believes, and therefore alleges, that said sum of $14,000.00 less the expenses of said sale, was thereupon delivered and paid over to said defendant, [69] Daniel A. McColgan, by said defendant, Robert McColgan, as such trustee.

That said defendant R. S. Marshall, obtained the said sum of $14,000.00, so paid to said defendant, R. McColgan, as aforesaid, in accordance with an agreement to that end entered into with plaintiff in the manner aforesaid.

That plaintiff is also informed and believes, and therefore alleges, that said defendant, R. S. Marshall, and Olive H. Marshall, his wife, received from said Annie Connors, at the special instance and request of plaintiff, the sum of $13,000.00 and did, in accordance with the agreement to that end made and entered into by and between plaintiff and defendant, R. S. Marshall, make, execute and deliver, on September 2, 1914, to said Annie Connors, their promissory note in the sum of $13,000.00 and to secure the payment of said promissory note did make, execute and deliver on September 2, 1914, a certain indenture in writing, or deed of trust, wherein and whereby they conveyed in trust the said real property so purchased at said sale by said defendant, R. S. Marshall, as aforesaid, to M. J. Connors and B. M. Lyon, as trustees for said Annie Connors.

That said last-mentioned Deed of Trust was recorded on September 3, 1914, in the said office of

said County Recorder of said County of Stanislaus, in volume 198 of Trust Deeds, at page 634 thereof, records of said County of Stanislaus.

That neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations or dealings with said Annie Connors relative to said loan of $13,000.00 but that all negotiations and dealings relative to said loan of $13,000.00 by said Annie Connors to plaintiff were had, made and entered into by and between plaintiff and said Annie Connors, and said sum of $13,000.00 was loaned by said Annie Connors to said defendants, [70] R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

That in pursuance of the terms of said agreement between plaintiff and said defendant, R. S. Marshall, said Marshall, and Olive H. Marshall, his wife received from said defendant, Daniel A. McColgan, at the special instance and request of plaintiff, the said sum of $2,455.00 in accordance with the agreement to that end made and entered into by and between plaintiff and defendant, R. S. Marshall, and did, on September 2, 1914, make, execute and deliver, for the use and benefit of plaintiff as aforesaid, their promissory note to said defendant, Daniel A. McColgan, in the sum of $2,455.00, and to secure the payment thereof did execute an instrument in writing wherein and whereby they conveyed said real property to defendants R. McColgan and Eustace Cullinan, in trust for said defendant, Daniel A. McColgan, but which Deed of

Trust was subordinate to said Deed of Trust likewise executed by said defendants, R. S. Marshall and Olive H. Marshall, his wife, to said Annie Connors; that said instrument in writing securing the payment of the said sum of $2,455.00 was duly acknowledged by said R. S. Marshall and Olive H. Marshall, his wife, and was recorded at the request of said Daniel A. McColgan in the office of the County Recorder of the said County of Stanislaus, on September 3, 1914, in Liber 210 of Trust Deeds, at page 41 thereof, and to which instrument in writing or to a certified copy thereof, the plaintiff for greater certainty begs leave to refer.

That neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations with said Daniel A. McColgan relative to said loan of $2,455.00, but that all negotiations and dealings relative to said loan of $2,455.00 by [71] said Daniel A. McColgan were had and taken by and between plaintiff and said Daniel A. McColgan, and said sum of $2,455.00 was loaned by said Daniel A. McColgan to said defendants, R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

That all of the several agreements, negotiations and understandings had by and between plaintiff and said defendant, R. S. Marshall, were at all the times herein mentioned fully known to said defendant, Daniel A. McColgan, and said defendant, Daniel A. McColgan, knew that all of the acts and deeds of said R. S. Marshall and Olive H. Marshall,

his wife, as aforesaid, were had and taken for the benefit and use of plaintiff, and at plaintiff's special instance and request.

VII.

That said defendant, Daniel A. McColgan, has requested said defendants, R. McColgan and Eustace Cullinan, as the trustees named in that certain indenture in writing last aforesaid, to sell the real property described therein under and in accordance with the terms thereof, and that said defendants, R. McColgan and Eustace Cullinan, have given notice by publication that they will, as such trustees, sell at public auction the said real property, on Monday, the 4th day of December, A. D. 1916, at the hour of twelve o'clock noon of said day, at the office of said R. McColgan, Room No. 502, Claus Spreckels Building, in the City and County of San Francisco, State of California.

That plaintiff is informed and believes, and therefore alleges, that said defendants, R. McColgan and Eustace Cullinan, as such trustees, threaten to and will, at said time and place, last aforesaid, unless restrained by order of this Court, and before the matter can be heard on notice, sell said real property to satisfy the demand for said sum of money last aforesaid. [72]

VIII.

Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of $14,000.00, and that he pay plaintiff such a sum as, upon such accounting, might appear to be justly due to him,

but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum of $14,000.00, or to pay to plaintiff the sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant, Daniel A. McColgan.

That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of $14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the Deed of Trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of $14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.

That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges, which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of $2,455.00.

IX.

Plaintiff alleges that the value of his equity in said real property is of far greater value than the amount alleged to [73] be due to defendant, Daniel A. McColgan, under and in accordance with

the terms of said promissory note for $2,455.00, and that the defendants can suffer no loss or injury if the proposed sale of said real property is delayed, while the plaintiff would suffer irreparable injury if said sale, heretofore advertised as aforesaid, should take place, as plaintiff would be without remedy of law if the defendants, R. McColgan and Eustace Cullinan, as such trustees, were permitted to sell the same; and that plaintiff has no plain, speedy or adequate remedy at law.

X.

That plaintiff had no knowledge or any means of knowledge of any of said acts or matters hereinbefore alleged to have been performed until one year last past, by reason of the fact that the acts and matters hereinbefore alleged to have been performed were peculiarly within the knowledge of defendants.

XI.

That said defendants, R. S. Marshall, and Olive H. Marshall, his wife, refused to join with plaintiff in bringing the above-entitled action, and for that reason are joined as parties defendant therein.

WHEREFORE, plaintiff prays for an order and decree of this Court:

1. Enjoining and restraining said defendants, R. McColgan and Eustace Cullinan, as such trustees, their agents, employees or attorneys, from selling or causing to be sold under the terms or in pursuance of the provisions of the Deed of Trust executed to said defendants, R. McColgan and Eustace Cullinan, as such trustees, by said defendants, R. S.

Marshall, and Olive H. Marshall, his wife, and bearing date September 2, 1914, the real property described therein, and being the same property mentioned and described in the complaint aforesaid. [74]

2. That said defendant, Daniel A. McColgan, be directed to render or set forth an account of all or every sum or sums of money which have come into his hands for or on account of plaintiff, and for the application thereof, and of dealings and transactions of said defendant, Daniel A. McColgan, in reference to said sum or sums of money.

3. That plaintiff have such further and other relief in the premises as to this Court shall seem meet and proper.

ALBERT C. AGNEW and
MILTON S. HAMILTON,
Attorneys for Plaintiff. [75]

State of California,
County of Alameda,—ss.

Fred V. Lineker, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to these matters he believes it to be true.

FRED V. LINEKER.

Subscribed and sworn to before me this 25th day of November, A. D. 1916.

ALBERT C. AGNEW,

Notary Public in and for the County of Alameda, State of California. [76]

Exhibit "B."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL and OLIVE H. MARSHALL, His Wife,

Defendants.

ANSWER OF DEFENDANTS DANIEL A. McCOLGAN, R. McCOLGAN AND EUSTACE CULLINAN.

Defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan answering the complaint of plaintiff on file herein admit, deny and aver as follows, to wit:

I.

Said defendants have no information or belief upon the subject sufficient to enable them to answer the allegation in plaintiff's complaint that on the 18th day of August, 1913, said Norvena E. S. Line-

ker conveyed the real property described in said complaint by gift deed to plaintiff, or that said conveyance was recorded as set forth in plaintiff's complaint, and placing their denial on that ground said defendants deny that on the 18th day of August, 1913, or at any time said Norvena E. S. Lineker conveyed the said real property described in plaintiff's complaint by gift deed or otherwise to plaintiff and deny that said or any such conveyance was recorded in the office of the County Recorder of said Stanislaus County on July 27, 1914, or at any time.

II.

Said defendants allege that the deed of trust made, [77] executed and delivered on June 20, 1910, referred to in paragraph II of plaintiff's complaint, was so executed to secure not only the payment of the promissory note for twenty-eight hundred fifty (2850) dollars, referred to in paragraph II of plaintiff's complaint, but also other sums that should or might be loaned by said Daniel A. McColgan to said Norvena E. Svensen, and evidenced by the promissory note or notes of said Norvena E. Svensen; that thereafter, and on or about the 14th day of July, 1910, said Norvena E. Svensen executed to said Daniel A. McColgan her promissory note, dated July 14, 1910, and payable one day after date for seventeen hundred (1700) dollars, which note recited that it was secured by said deed of trust dated June 20, 1910, and which note was signed also by one William Winter as a comaker with said Norvena E. Svensen; that there-

after, said Norvena E. Svensen on or about the 3d day of January, 1913, executed to said Daniel A. McColgan, her promissory note, dated January 3, 1913, for seven hundred and fifty (750) dollars, which note was payable six (6) months after the date thereof, and which note recited that it was secured by said deed of trust dated June 20, 1910; and that on the 23d day of April, 1914, neither said note for twenty-eight hundred fifty (2850) dollars, nor said note for seventeen hundred (1700) dollars, nor said note for seven hundred and fifty (750) dollars had been paid, and all of said notes, together with a large amount of interest thereon, were due, owing and unpaid.

III.

Said defendants allege that the correct name of said defendant described in said complaint as "Robert McColgan" is "Reginald McColgan," who is also known and designated as R. McColgan. [78]

IV.

Allege that the sale of said real property, which sale is referred to in paragraph II of plaintiff's complaint, was postponed from May 24, 1914, from time to time, until September 2, 1914, by the trustees, in said deed of trust named, at the request of said Norvena E. Lineker, formerly and otherwise known as Norvena E. Svensen; that said defendants admit that said sale was held on the 2d day of September, 1914, and that said real property was sold thereat by said defendant, R. McColgan as such trustee to said defendant, R. S. Marshall, but deny that said property was so sold, or that

said or any sale thereof was held pursuant to the or any agreement by and between said plaintiff and said defendant, Daniel A. McColgan, or in and in, the manner in said complaint alleged.

V.

Said defendants deny that after said notice of sale had been given in the manner prescribed by said deed of trust, and prior or prior to the sale of said real property, as mentioned in said complaint, or at any time, or at all, plaintiff and defendant, Daniel A. McColgan made or entered into any agreement wherein or whereby they agreed that plaintiff would purchase said real property at said or any sale for any sum of money or for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other lien subsisting against said real property not secured by said deed of trust and deny that said agreement referred to in paragraph III of plaintiff's complaint, or any agreement similar in character was ever made or entered into by said [79] Daniel A. McColgan and said plaintiff at any time or at all. Deny that said plaintiff at the time referred to in paragraph III of plaintiff's complaint made a formal or any demand upon said defendant, Daniel A. McColgan, that he rendered an account of the amount claimed to be due to him by said Norvena E. S. Lineker and deny that said defendant, Daniel A. McColgan refused to render any such account and deny that said Daniel A. McColgan then or there or at any time or

place informed plaintiff that the said real property should be sold for the sum of ten thousand (10,000) dollars and deny that said Daniel A. McColgan at any time or place informed plaintiff that said sum of ten thousand (10,000) dollars would be sufficient to repay the amount claimed to be due to him by said Norvena E. S. Lineker, including or excluding the expenses of said sale and also any other alleged lien subsisting against said real property but not secured by said deed of trust or otherwise. Deny that thereupon or ever or at all the plaintiff and said defendant, Daniel A. McColgan further or at all agreed that plaintiff would bid the sum of ten thousand (10,000) dollars, or any sum for said or any real property at said or any sale and deny that upon the further or any understanding or agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant, to wit, said Daniel A. McColgan, from said trustee, to wit, said R. McColgan, in the manner in said complaint alleged or otherwise, he, said Daniel A. McColgan would not pay or cause to be paid any of said alleged liens until the same had been judicially determined to be valid and subsisting or valid or subsisting liens aganist the said real property and deny that said Daniel A. McColgan ever made the further or any understanding or agreement with said plaintiff that said Daniel A. [80] McColgan would account to plaintiff for all or any moneys coming into his hands as the proceeds of said sale and said defendants deny that said Daniel A. McColgan made

with said plaintiff or any other person any such agreement, or had with plaintiff any such understanding as is set forth or referred to in paragraph III of plaintiff's complaint.

VI.

Said defendants deny that at the time of any agreement referred to in plaintiff's complaint or at any other time said defendant, Daniel A. McColgan knew that plaintiff was not possessed of said sum of ten thousand (10,000) dollars, or of the sum of ten thousand (10,000) dollars but that one or that one Annie Connors had agreed to lend plaintiff on his promissory note or otherwise, the sum of thirteen thousand (13,000) dollars to be used by plaintiff in purchasing said real property at said sale, or for any other purpose and that or that the payment of said last mentioned note or any note or sum of money was to be secured thereafter or at any other time by an indenture in writing wherein and whereby plaintiff when he had acquired title thereto was to convey said real property to said Annie Connors in trust for the purposes last aforesaid; deny that thereafter and prior or prior to said sale or ever or at all it was agreed between plaintiff and said defendant, Daniel A. McColgan that for the purpose of securing said defendant, Daniel A. McColgan in the event that he should be made to pay any of the liens alleged to be subsisting against said real property and which or which were not secured by the deed of trust first in said complaint referred to, or for any other purpose, that plaintiff would execute or deliver to said defendant,

Daniel A. McColgan his promissory note in the sum of [81] twenty-four hundred fifty-five (2455) dollars and that or that plaintiff in order to secure the payment of said last mentioned note would execute or deliver to said defendant, Daniel A. McColgan an indenture in writing wherein or whereby he would convey said real property when he had acquired the title thereto or ever or at all to said defendant, Daniel A. McColgan in trust or otherwise, for the purposes referred to in paragraph IV of plaintiff's complaint or for any other purpose but upon or upon the condition that said last mentioned deed of trust would be subject and subordinate to the deed of trust to be delivered to said Annie Connors, as set forth in said complaint, or upon any condition or at all; and deny that said Daniel A. McColgan ever entered into any agreement with said plaintiff referred to in paragraph IV or any other paragraph of plaintiff's complaint.

VII.

Said defendants deny that at any time referred to in paragraph V of plaintiff's complaint, or at any time or at all the plaintiff and said defendant, Daniel A. McColgan entered into any agreement wherein or whereby they agreed that Daniel A. McColgan was to purchase for the use or benefit of plaintiff from said William C. Crittendon all or any of the right, or title or interest of said William C. Crittendon in or to said real property and in or in or to said certificate of sale and to repay or to repay himself for the moneys thus expended by him, out of the moneys coming into his hands from

said trustee at said trustee's sale or otherwise, and said defendants deny that it was also or further agreed or understood or ever or at all agreed or understood by and between plaintiff and said [82] defendant, Daniel A. McColgan, that the sum of ten thousand (10,000) dollars, or any sum would be sufficient to cover the sum which would be expended by defendant, Daniel A. McColgan in the purchase of said judgment and certificate of sale, and said defendants deny that said Daniel A. McColgan ever entered into any such agreement with plaintiff as is set forth in paragraph V of plaintiff's complaint; and said defendants admit that on the 15th day of July, 1914, said Daniel A. McColgan purchased from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property and in and to said certificate of sale but deny that said Daniel A. McColgan so purchased the said real property or any interest therein or said certificate of sale from said William C. Crittendon or any other person in acordance with any agreement or understanding had with plaintiff or for the use or benefit of plaintiff; said defendants deny that in the purchase of said judgment and certificate of sale mentioned or referred to in paragraph V of plaintiff's complaint, or in any part of plaintiff's complaint, said defendant, Daniel A. McColgan well or at all knew that he was acting, and deny that said Daniel A. McColgan was acting therein, in accordance with any agreement with plaintiff to that or any end or in accordance with any agreement with plaintiff

and also or also that said purchase last aforesaid, or any purchase, was made by said defendant, Daniel A. McColgan, for the use or benefit of plaintiff and deny that any purchase referred to in plaintiff's complaint was made by Daniel A. McColgan for the use and benefit of plaintiff. Said defendants have no information or belief upon the subject of lines 4 to 19, inclusive, in paragraph VI of plaintiff's complaint, sufficient to enable them [83] to answer the allegations thereof and placing their denial on that ground said defendants deny that before or after any agreement made or entered into by and between said defendant, Daniel A. McColgan, and plaintiff, or prior to the sale of said real property as set forth in said complaint, or at any time, plaintiff and defendant, R. S. Marshall made or entered into any agreement wherein or whereby it was understood or agreed that said defendant, R. S. Marshall, should attend said sale and purchase thereat for plaintiff the said real property in said complaint described, and should, or should bid thereat the sum of fifteen thousand, four hundred fifty-three (15,453) dollars or thereabouts or any sum for said real property, and deny that it was further or otherwise agreed between the parties last mentioned or any other parties or any persons that said R. S. Marshall and Olive H. Marshall, his wife, or either of them, should make or execute or deliver as and for the act or deed of plaintiff or otherwise and at the special or any instance or request of plaintiff or otherwise the two promissory notes for the respective sums of

thirteen thousand (13,000) dollars and twenty-four hundred fifty-five (2455) dollars, and the payment or the payment of which was to be secured in the manner aforesaid, and deny that either said R. S. Marshall or said Olive H. Marshall, his wife, ever entered into said or any such agreement with plaintiff. Said defendants admit that said R. S. Marshall attended said sale on September 2, 1914, and bid thereat the sum of fourteen thousand (14,000) dollars for said real property and that thereupon said defendant, R. McColgan, as such trustee, sold said real property to said defendant, R. S. Marshall, who bid therefor to said R. McColgan, as trustee, the said sum of fourteen thousand (14,000) dollars, but deny that said R. S. Marshall in so doing [84] was carrying out the or any of the terms of said or any agreement referred to in plaintiff's complaint or that said R. S. Marshall bought said property or that the said property was sold to said R. S. Marshall, or otherwise, in accordance with any understanding or agreement had between said R. S. Marshall and plaintiff as set forth in plaintiff's complaint or otherwise. Deny that said defendant, R. S. Marshall obtained the said sum of fourteen thousand (14,000) dollars, so paid to said defendant, R. McColgan as set forth in said complaint or obtained any sum whatsoever in accordance with any agreement to that or any other end entered into with plaintiff in the manner set forth in plaintiff's complaint or at all. Said defendants have no information or belief upon the subject referred to on page 9 of plaintiff's complaint, liens

7 to 20 thereof, both inclusive, contained in paragraph VI of said complaint, sufficient to enable them to answer *an* placing their denial on that ground said defendants deny that said defendant R. S. Marshall and Olive H. Marshall, his wife, received from Annie Connors at the special instance and request of plaintiff, or otherwise, or at all, the sum of thirteen thousand (13,000) dollars, and deny that said R. S. Marshall and Olive H. Marshall, his wife, or either of them, made, executed or delivered on September 22, 1914, to said Annie Connors the promissory note for thirteen thousand (13,000) dollars, or the deed of trust, or any deed of trust referred to in plaintiff's complaint at the special or any instance or request of plaintiff or in accordance with any agreement to that end made and entered into by or between defendant, R. S. Marshall, or in accordance with any agreement entered into by plaintiff with said R. S. Marshall. [85]

VIII.

Said defendants have no information or belief upon the subject referred to on line 21 to 24, inclusive, on page 9 of plaintiff's complaint, contained in paragraph VI thereof, sufficient to enable them to answer the allegations thereof and placing their denial on that ground they deny that said last mentioned deed of trust was recorded at the time and place stated in plaintiff's complaint or ever or at all. Said defendants have no information or belief upon the subjects referred to in lines 25 to 31, inclusive, on page 9 and in lines 1 to 3, inclusive on

page 10, of said complaint, sufficient to enable them to answer the allegations thereof and placing their denial on that ground said defendants deny that neither said defendant, R. S. Marshall, nor Olive H. Marshall, his wife, ever had any negotiations or dealings with said Annie Connors relative to said loan of thirteen thousand (13,000) dollars and that or that any negotiations or dealings relative to said loan of thirteen thousand (13,000) dollars to said Annie Connors were had or made or entered into by and between said Plaintiff and Annie Connors and that or that said sum of thirteen thousand (13,-000) dollars was loaned by said Annie Connors to said defendants, R. S. Marshall and Olive H. Marshall, his wife, or either of them, for the use and benefit of plaintiff and at or at plaintiff's special instance or request or otherwise. Said defendants admit that said R. S. Marshall and Olive H. Marshall, his wife, received from said defendant, Daniel A. McColgan, the said sum of twenty-four hundred fifty-five (2455) dollars but deny that they received said sum of twenty-four hundred fifty-five (2455) dollars or that said Daniel A. McColgan paid said sum in pursuance of the terms of said or any agreement between said plaintiff and said defendant, R. S. Marshall or Olive H. Marshall, his wife, or [86] either of them and deny that said defendant R. S. Marshall, or said defendant, Olive H. Marshall, did on September 2, 1914, or at any other time make or execute or deliver the said promissory note for twenty-four hundred fifty-five (2455) dollars, referred to on page 10 of plaintiff's complaint for the

use or benefit of plaintiff as set forth in said complaint or in pursuance of any agreement made by any persons with plaintiff, and deny that the deed of trust which was executed by said R. S. Marshall and Olive H. Marshall, his wife, to defendants, R. McColgan and Eustace Cullinan in trust for said defendant, Daniel A. McColgan was executed for the use or benefit of said plaintiff, or for the use or benefit of any person other than Daniel A. McColgan, or at the instance or request of said plaintiff, or in pursuance of any agreement made by any person with said plaintiff and said defendants deny that said sum of twenty-four hundred fifty-five (2455) dollars, or any sum, was loaned by said Daniel A. McColgan to said defendants R. *H.* Marshall and Olive H. Marshall, his wife, or either of them, for the use or benefit of plaintiff and at or at plaintiff's special instance or request or otherwise; and said defendants deny that all or any of the several agreements or negotiations or understandings alleged in said complaint to have been had by or between plaintiff and said defendant, R. S. Marshall were at all or any of the times in said complaint mentioned or at any other time fully or at all known to said defendant, Daniel A. McColgan; and deny that any or all of the acts or deeds of said R. S. Marshall and Olive H. Marshall, his wife, as aforesaid, or either of them, were had or taken for the benefit or use of plaintiff and at or at plaintiff's special instance [87] or request or otherwise.

IX.

Deny that said Daniel A. McColgan wholly or at all refused or refuses and declines or declined to render to said plaintiff an account of said sum of fourteen thousand (14,000) dollars and on the contrary said defendant alleges, that while denying the right of plaintiff to any such accounting, he has rendered to plaintiff such an accounting and said defendants admit that said Daniel A. McColgan refused to pay to plaintiff any sum of money whatsoever but deny that any sum of money is due or owing from said Daniel A. McColgan to said plaintiff in accordance with any agreement had to that end by and between plaintiff and defendant, Daniel A. McColgan, or any agreement referred to in plaintiff's complaint, or any agreement at all; and said defendants deny that a large or any amount of said sum of fourteen thousand (14,000) dollars has been retained by said Daniel A. McColgan contrary to or in violation of his or any agreement with plaintiff as set forth in said complaint or otherwise and deny that the amount so retained by said defendant, Daniel A. McColgan can only be ascertained upon an accounting had by said defendant, Daniel A. McColgan, and said defendants deny that there is justly or at all due or owing or unpaid to plaintiff by said defendant, Daniel A. McColgan, as set forth in said complaint or otherwise, considerably more than the said sum of twenty-five hundred fifty-five (2455) dollars, or any sum whatsoever.

X.

Said defendants deny that the value of plaintiff's

equity in said real property is of far or any greater value than the amount alleged to be due to said defendant, Daniel A. McColgan [88] under and in accordance with the terms of said promissory note for twenty-four hundred fifty-five (2455) dollars, and deny that said plaintiff has or at any time since the 15th day of July, 1914, had any equity or interest or right, or title, or estate, whatsoever in or to said real property or any part thereof. Said defendants deny that the defendants can suffer any loss or injury if the proposed sale of said real property is delayed and on the contrary allege that said defendants would suffer great loss and injury if the sale of said real property were delayed, and deny that the plaintiff would suffer irreparable or any injury if said sale heretofore advertised as aforesaid should take place; deny that plaintiff would be without remedy at all if the defendants, R. McColgan and Eustace Cullinan, as such trustees, were permitted to sell the same and deny that plaintiff has no plain, speedy or adequate remedy at law and deny that such sale would injure the plaintiff in any measure or degree.

XI.

Said defendants deny that plaintiff had no knowledge or any means of knowledge of any of said acts or matters referred to in said complaint until one year last past and deny that the acts and matters or any of the acts and matters referred to in plaintiff's complaint were peculiarly within the knowledge of the defendants.

XII.

And further answering the complaint of plaintiff the said defendants, Daniel A. McColgan and R. McColgan and Eustace Cullinan by way of special answer and defense, allege that the alleged cause of action set forth in plaintiff's complaint is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California, and also [89] by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and also by the provisions of subdivisions 1 and 2 of section 337 of the Code of Civil Procedure of the State of California.

And further answering the complaint of plaintiff herein, and as a further and special defense to said action, said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan allege that there was at the commencement of this action and there still *in* another action pending in the Superior Court of the State of California, in and for the County of San Francisco, between the same parties, and for the same cause of action as that in the complaint herein stated and alleged; that said other action so pending in the Superior Court of the State of California, in and for the City and County of San Francisco, is entitled "Fred V. Lineker, Plaintiff, vs. Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall, Olive H. Marshall and Mary J. Tynan, Defendants," and the said action is numbered 75395 on the files of said court.

And further answering the complaint of plaintiff, and as a further and special defense to the above-

entitled action, said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan allege as follows, to wit:

That on or about the 26th day of July, 1916, said Fred V. Lineker, the plaintiff in the above-entitled action, commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, by filing his complaint therein, an action against the defendants, Daniel A. [90] McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall, Olive H. Marshall and Mary J. Tynan; that in his complaint in said action said Fred V. Lineker prayed for an order and decree of the said Superior Court of the State of California, in and for the City and County of San Francisco, enjoining and restraining said defendants, R. McColgan and Eustace Cullinan from selling or causing to be sold under the terms or in pursuance of the provisions of the deed of trust executed to said defendants, R. McColgan and Eustace Cullinan by said defendants, R. S. Marshall and Olive H. Marshall, his wife, and which deed of trust bears date September 2, 1914, the real property described in said deed of trust which real property was the same real property described in the complaint of plaintiff on file herein and in his complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, said plaintiff further prayed that defendant, Daniel A. McColgan be directed to render or set forth an account of all or every sum or sums of money which have come into his hands for or on account of plain-

tiff or for the application thereof and of all dealings and transactions of said defendants, Daniel A. McColgan, in reference to said sum or sums of money which said transactions and sums of money were the same transactions or sums of money referred to in the complaint of plaintiff on file herein, and in his said complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, said plaintiff, Fred V. Lineker, prayed that he have such other and further relief in the premises as to said Court should seem meet and proper; that summons in said action directed to the defendants therein was issued by the Clerk of the said [91] Superior Court of the State of California, in and for the City and County of San Francisco, on the 26th day of July, 1916, and was served on said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan on the 26th day of July, 1916; that on said 26th day of July, 1916, the said Superior Court of the State of California, in and for the City and County of San Francisco, gave, made, entered and issued its restraining order and order to show cause wherein and whereby it was by said Court ordered that until the hearing of said order to show cause and until the further order of said Court the said defendants therein named, to wit, said R. McColgan and said Eustace Cullinan, and each of them, be and they were thereby restrained and enjoined from selling or causing to be sold or taking any further action in relation to the sale of that certain real property described in that certain deed of trust so made by

said R. S. Marshall and Olive H. Marshall, his wife, in trust to said defendants, R. McColgan and Eustace Cullinan, which said deed of trust was recorded in the office of the County Recorder of Stanislaus County in Liber 210 of trust deeds at page 41 thereof, and which said real property was the same real property described in the complaint of plaintiff in the above-entitled action, and by said order said Court further ordered that said defendants and each and all of them appear before said Court, to wit, said Superior Court of the State of California, in and for the City and County of San Francisco, department number 16 thereof, in the courtroom thereof, in the City Hall, in the City and County of San Francisco, State of California, on the 4th day of August, 1916, at the hour of ten o'clock A. M. of said day then and there to show cause, if any they have, why an injunction should not be granted restraining [92] and enjoining said defendants, to wit, R. McColgan and said Eustace Cullinan from selling or causing to be sold or from taking any further action relative to the sale of the real property in said order and in the complaint in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, described, which said real property was as aforesaid the same real property described in the complaint herein; that thereafter, the hearing of said order to show cause was duly and regularly continued by the said Superior Court of the State of California, in and for the City and County of San Francisco, to and until the 25th day

of October, 1916; that on or about the 31st day of August, 1916, the said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan filed in said action then pending in the Superior Court of the State of California, in and for the City of San Francisco, their answer to the complaint of plaintiffs therein; that on said 13th day of October, 1916, the said order to show cause came on duly and regularly for hearing, upon the complaint of plaintiff and the answer of said defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan in said action, and evidence thereon was heard by said Court, the plaintiff being then and there represented by his counsel, Milton S. Hamilton, Esq., and the defendants, R. McColgan, Daniel A. McColgan and Eustace Cullinan being then and there represented by their counsel, Messrs. Cullinan & Hickey, and the matter was thereupon submitted to the Court on its merits for decision and thereafter on the 25th day of October, 1916, the said Court gave, made and entered its decision and judgment as follows, to wit: [93]

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

Department No. 16.
In Open Court.
October 25, 1916.
No. 75395.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL McCOLGAN et al.,

Defendants.

This cause having been heretofore submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised herein, It is ordered by the Court that Plaintiff's motion for an injunction to issue, *pendente lite,* or an order to show cause be and the same is hereby denied. And it is further ordered by the Court that the restraining order now in effect, be and the same is hereby discharged."

That said order, judgment and decision of said Court has become final and that by said judgment, order and decision so given, made and entered by said Superior Court of the State of California, in and for the City and County of San Francisco, the plaintiff herein is barred and estopped from maintaining the above-entitled action in the Superior Court of the State of California, in and for the County of Stanislaus;

WHEREFORE said defendants pray that plaintiff take nothing by his action and that said defendants have judgment against plaintiff for their costs, and that said action be abated and dismissed.

(Signed) CULLINAN & HICKEY,
Attorneys for said Defendants. [94]

State of California,
City and County of San Francisco,—ss.

Daniel A. McColgan, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled action and makes this affidavit on his own behalf and on behalf of his codefendants, R. McColgan and Eustace Cullinan; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

(Signed) DANIEL A. McCOLGAN.

Subscribed and sworn to before me this 1st day of December, 1916.

[Seal] (Signed) E. J. CASEY,
Notary Public in and for the City and County of San Francisco, State of California. [95]

Exhibit "C."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL and OLIVE H. MARSHALL, His Wife,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SECOND TRIAL.

The above-entitled action having been duly and regularly set for trial, and coming on regularly for trial on the 13th day of February, 1917, before the above-entitled court, Department No. 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, the Court, on the motions of defendants, R. S. Marshall and Olive H. Marshall, his wife, and with the consent of plaintiff, dismissed the said action as against said defendants, R. S. Marshall and Olive H. Marshall, his wife, and evidence oral and documentary having been introduced on behalf of the plaintiff, Fred V. Lineker, and on behalf of the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan, and the action having been submitted

to the Court for its decision, the Court on or about the 2d day of March, 1917, made and filed its Findings of Fact and Conclusions of Law and rendered judgment in favor of the defendants, which judgment was on or about the 2d day of March, 1917, duly entered. Thereafter plaintiff [96] duly made a motion to vacate said judgment and for a new trial of said action, and said Court, on the 7th day of June, 1917, after considering said motion, vacated said judgment theretofore entered in favor of plaintiff and granted a new trial of said action. Thereafter said action came on regularly for such new or second trial thereof and was tried on or about the 20th day of September, 1917, before the said Court, department No. 2 thereof, Honorable William H. Langdon, Judge thereof, sitting without a jury, plaintiff being represented by his counsel, Milton S. Hamilton, Esq., and defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan being represented by Eustace Cullinan, Esq., of Cullinan & Hickey, their attorneys, and said trial having been held on said 20th day of September, 1917, and subsequent days until completed, and evidence having been submitted by all parties and the cause submitted, the Court now makes its Findings of Fact and Conclusions of Law, and finds and concludes as follows, to wit:

FINDINGS OF FACT.

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one Norvena E.

S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situate in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

> All that portion of the Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

II.

That said real property was on the 6th day of August, [97] 1915, and has been for some time prior thereto, subject to a life interest therein in favor of Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915; that thereafter proceedings were duly had and taken wherein and whereby the life estate of said Ole Svensen was thereby terminated, and the above-entitled Court, in a proceeding regularly had in that behalf, duly made and entered its decree terminating said life estate.

III.

That on the 22d day of September, 1912, Norvena E. Svensen and Fred V. Lineker, plaintiff herein, intermarried, and ever since the said 22d day of September, 1912, they have been and are now husband and wife.

IV.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to plaintiff herein, and said conveyance was recorded in the office of the County Re-

corder of said Stanislaus County, on July 27, 1914, in Volume 193 of Deeds, at page 590 thereof, records of said County of Stanislaus. That on or about the 20th day of June, 1910, and while she was the owner of said real property, the said Norvena E. S. Lineker executed and delivered to defendant, R. McColgan, as trustee for the defendant, Daniel A. McColgan, a deed of trust wherein and whereby the said Norvena E. S. Lineker conveyed and granted the said real property to said R. McColgan, as trustee, to secure the payment by said Norvena E. S. Lineker of a certain promissory note, executed by said Norvena E. S. Lineker to the defendant, Daniel A. McColgan, as payee thereof, for the sum of Twenty-eight hundred fifty dollars ($2850), and to secure the payment also of other sums that should or might be loaned by said Daniel *A.* McColgan to Norvena E. Svensen, and evidenced by the promissory [98] note or notes of Norvena E. Svensen, the said deed of trust was recorded in the office of the County Recorder of the County of Stanislaus, State of California, on the 22d day of April, 1911, in Volume 146 of Deeds, at page 378; and at the time when the said Norvena E. S. Lineker conveyed the said real property to the said plaintiff by deed of gift, as aforesaid, the said real property was subject to the said deed of trust.

V.

That on the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and for the County of Alameda,

one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen, who afterwards became Norvena E. S. Lineker when she married the plaintiff, as aforesaid, which judgment was for the sum of Twelve Hundred Eighty-five Dollars ($1285.00), together with Fifteen ($15.00) Dollars costs; that in said action a writ of execution was issued to the Sheriff of the County of Stanislaus on the 29th day of July, 1913, directing said sheriff of the County of Stanislaus, to satisfy said judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as the sheriff of said County of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property, being the same property described herein, and in said deed of trust, and after giving notice as required by law, said sheriff of the County of Stanislaus sold said real property at public auction, in accordance with said writ of execution, and at said sale, which was held on the 30th day of August, 1913, the said Sheriff of said County of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of Thirteen hundred sixty-one and 20/100 ($1361.20) [99] Dollars, and said Sheriff of said County of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said certificate was duly filed by said Sheriff of said County of Stanislaus in the office of the County Recorder of the County of

Stanislaus, and there recorded on the 3d day of September, 1913, in Volume 3 of Certificates of Sale, at page 81 thereof. That, thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan, and instrument in writing whereby said William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described; that said instrument in writing so executed by William C. Crittendon, to said defendant, Daniel A. McColgan, was recorded in the office of the County Recorder of said County of Stanislaus at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneious, at page 343 thereof. That thereafter, and on the said 2d day of September, 1914, the said *W.* S. Dingley, as Sheriff of said County of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Crittendon as aforesaid, the assignment by said William C. Crittendon to said Daniel A.

[100] McColgan, as aforesaid, and granting, in accordance with the law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which said judgment debtor, Norvena E. Svensen, had, at the time of the levy of said writ of execution, as aforesaid, or on the said 2d day of September, 1914, had in or to said land; and said deed from said Sheriff to said Daniel A. McColgan was recorded in the office of the County Recorder of said County of Stanislaus at thirteen minutes past two o'clock, P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

VI.

That said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale for his own use and benefit, and with his own money; that said Daniel A. McColgan did not purchase or acquire the said right, title and interest of said William C. Crittendon in and to said real property, or in and to said certificate of sale, for the use or benefit of said plaintiff or of any person except himself, said Daniel A. McColgan, and did not purchase or acquire said interest of said William C. Crittendon in or to said certificate of sale or said real property, and did not receive said deed from said Sheriff in pursuance of any agreement whereby the said Daniel A. McColgan, either prior or subsequent

to the purchase of said certificate, agreed with said plaintiff or with any other person that said Daniel A. McColgan was to purchase for the use or benefit of plaintiff or of any other person, from said William C. Crittendon all or any of the [101] right, title or interest of said William C. Crittendon in and to said real property or in and to said certificate of sale; that said Daniel A. McColgan never entered into any agreement with plaintiff or any other person wherein or whereby said Daniel A. McColgan agreed that he was to purchase, for the use or benefit of plaintiff from William C. Crittendon all the right, title or interest of said William C. Crittendon in or to said real property, or in or to said certificate of sale; that said Daniel A. McColgan never entered into an agreement with plaintiff or any other person wherein or whereby said Daniel A. McColgan agreed that he was to purchase from said William C. Crittendon for the use and benefit of plaintiff or otherwise, all or any of the right or title of said William C. Crittendon in or to said real property or in or to said certificate of sale, or to repay himself for the moneys thus expended by him out of the moneys coming into his hands from any trustee at any trustee's sale, and it was never agreed or understood by or between plaintiff and said Daniel A. McColgan or by or between said Daniel A. McColgan or any other person that the sum of ten thousand ($10,000) Dollars, referred to in plaintiff's complaint, or any other sum would be sufficient to cover the sum which

would be expended by defendant, Daniel A. McColgan in the purchase of said judgment and certificate of sale; that all the allegations in plaintiff's complaint to the effect that Daniel A. McColgan made any agreement with plaintiff or any other person to purchase from said William C. Crittendon all or any of the title or interest of said William C. Crittendon in and to said real property and in and to said certificate of sale for the use and benefit of plaintiff, are, and each of them is untrue; and said Daniel A. McColgan did not purchase or acquire any of the right or title or interest of said William C. Crittendon [102] in or to said real property, or in or to said certificate of sale, in accordance with any agreement or understanding had with the plaintiff, but he purchased the same for his own exclusive use and benefit.

VII.

That on or about the 23d day of April, 1914, said R. McColgan, as the trustee named in said deed of trust, gave notice, and caused notice to be given, in accordance with the terms of said deed of trust, that he would on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said deed of trust, being the same property herein described, and that said sale was thereafter postponed from time to time, as provided in said deed of trust, and at the request of plaintiff, from the 25th day of May, 1914, to the 2d day of September, 1914, and on said 2d day of September, 1914, at 3 o'clock P. M. on said day said real property was sold by R. McColgan, as

the trustee named in said deed of trust, under and in accordance with the provisions of said deed of trust, and at said sale, the said real property was sold by said R. McColgan, as such trustee, to one R. S. Marshall, defendant herein; that said sale was not made, pursuant to any agreement between said plaintiff and said defendant, Daniel A. McColgan, whether set forth in the complaint of plaintiff on file herein or otherwise.

VIII.

That on and prior to the 2d day of September, 1914, the said real property was subject to certain liens and encumbrances as follows, to wit:

An attachment levied May 21, 1912, in an action then and now pending in the Superior Court of the State of California, in and [103] for the County of Stanislaus, entitled "Farmers and Merchants Bank, a corporation, vs. Norvena E. Svensen and Mary J. Tynan," which attachment was for One Thousand and Forty-seven and 75/100 ($1,047.75) Dollars, with interest at the rate of eight (8%) per cent from the 14th day of July, 1911, interest to be compounded semi-annually.

Attachment levied on the —— day of ——, 191—, in an action then and now pending in the ——, National Bank of Modesto, a Corporation, Plaintiff, vs. Norvena E. Lineker and Fred V. Lineker, Defendants, which attachment was for One Hundred and Ninety-three and 34/100 ($193.34) Dollars.

Attachment levied November 6, 1912, in an action then pending in the Superior Court of the State of California, in and for the County of Stanislaus

entitled "Mary J. Tynan, Plaintiff, vs. Norvena E. Lineker (formerly Norvena E. Svensen), Defendant" which attachment was on the 4th day of August, 1914, reduced to judgment, in favor of the plaintiff for the sum of One Thousand Two Hundred and Sixty-four and 91/100 ($1,264.91) Dollars, with interest thereon at the rate of seven (7%) per cent per annum.

The claims which were secured by said attachments in favor of said First National Bank of Modesto and said Farmers and Merchants Bank, a corporation, and by said attachment and judgment in favor of said Mary J. Tynan, respectively, have never been satisfied or discharged.

IX.

That until the 2d day of September, 1914, said Fred V. Lineker did not have sufficient money to enable him to purchase said real property at said sale so to be held under said deed of trust [104] *of trust;* that it was apparent to said Fred V. Lineker, on and prior to the 2d day of September, 1914, that it would be necessary for him in order to purchase said real property at said sale under said deed of trust to bid in said real property for a sum not less than Fourteen Thousand ($14,000) Dollars, in order to prevent said real property from being purchased at said trustee's sale by some one of the said persons who had had said real property attached as aforesaid; that said Fred V. Lineker and one R. S. Marshall, on or about said 2d day of September, 1914, and prior to said sale under said deed of trust, made and entered into an agreement

wherein and whereby it was understood and agreed that R. S. Marshall should attend said sale under said deed of trust and purchase thereat for said Fred V. Lineker the said real property and should bid in the said real property for the sum of Fourteen Thousand ($14,000.00) Dollars at said sale; that in order to obtain said sum of Fourteen Thousand ($14,000.00) Dollars it was further agreed between said Fred V. Lineker and R. S. Marshall at the same time, that the said R. S. Marshall and Olive H. Marshall his wife, should borrow from Annie Connors the sum of Thirteen Thousand ($13,000.00) Dollars and execute to said Annie Connors their promissory note for the sum of Thirteen Thousand ($13,000.00) Dollars so borrowed and interest thereon, and should also execute to M. J. Connors and B. M. Lyon as trustees, for said Annie Connors, their deed of trust conveying to said M. J. Connors and B. M. Lyon as such trustees, the said real property to secure the payment of said promissory note for Thirteen Thousand ($13,000.00) Dollars so executed by said R. S. Marshall and Olive H. Marshall, his wife, to said Annie Connors; and it was further agreed that said R. S. Marshall and Olive H. Marshall, his wife, in order to obtain the additional One Thousand ($1,000) Dollars necessary for the [105] purchase of said land at said trustee's sale as aforesaid, and in order to obtain Four Hundred and Fifty-five ($455.00) Dollars to pay said Annie Connors as and for Six (6) months interest in advance on said note for Thirteen Thousand ($13,000.00) Dollars, and in order to obtain an ad-

ditional sum of One Thousand ($1,000) Dollars for said Fred V. Lineker, should borrow the sum of Two Thousand Four Hundred and Fifty-five ($2,-455.00) Dollars from said Daniel A. McColgan and should execute to said Daniel A. McColgan their promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest, and to secure the payment of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest, should execute to R. McColgan and Eustace Cullinan as trustees for said Daniel A. McColgan their deed of trust (which deed of trust should be subordinate and subsequent to said deed of trust so given to secure the payment of said note to Annie Connors), and which deed of trust should convey to R. McColgan and Eustace Cullinan as such trustees, the said real property as security for the payment of said note for Two Thousand Four Hundred and Fifty-five to said Daniel A. McColgan; and in pursuance of such agreement between said R. S. Marshall and said Fred V. Lineker, the said R. S. Marshall did attend the said sale on August 2d, 1914, and did bid thereat the sum of Fourteen Thousand ($14,000.00) Dollars for said real property, and thereupon said R. McColgan as the trustee in said deed of trust dated June 20, 1910, sold said real property to R. S. Marshall who paid therefor to R. McColgan the said sum of Fourteen Thousand ($14,000.00) Dollars and said R. S. Marshall and Olive H. Marshall, his wife, did, thereupon, in accordance with said understanding and agreement

between R. S. Marshall and said Fred V. Lineker as aforesaid, borrow the said sum of Thirteen [106] Thousand ($13,000.00) Dollars from said Annie Connors and execute to said Annie Connors their promissory note for Thirteen Thousand ($13,-000.00) Dollars as aforesaid, and their said deed of trust conveying said land to M. J. Connors and B. M. Lyon trustees for said Annie Connors as aforesaid, and did also borrow and receive said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars from said Daniel A. McColgan, and did execute to said Daniel A. McColgan their promissory note for the said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest thereon, and did execute to said Daniel A. McColgan their deed of trust conveying said land to R. McColgan and Eustace Cullinan as trustees for said Daniel A. McColgan to secure the payment of said promissory note to said Daniel A. McCol-gan for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars; and said R. S. Marshall out of the said Thirteen Thousand ($13,000.00) Dollars so borrowed from Annie Connors, and the said sum of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars so borrowed of Daniel A. McColgan did pay the said sum of Fourteen Thou-sand ($14,000.00) Dollars the purchase price of said land to said R. McColgan as trustee under said deed of trust dated June 20, 1910, did pay the said Annie Conners the sum of Four Hundred and Fifty-five (455.00) Dollars interest on said note for Thirteen Thousand ($13,000.00) Dollars, and did pay to said

Fred V. Lineker the remaining One Thousand ($1,-000.00) Dollars for the use and benefit of said Fred V. Lineker; and said R. S. Marshall in and about said transactions acted as the agent and representative of said Fred V. Lineker; the said deed of trust so executed to M. J. Connors and B. M. Lyon as trustees for said Annie Connors and the promissory note secured thereby was so executed on the 2d day of September, 1914, and said deed [107] of trust was recorded in the office of the County Recorder of the County of Stanislaus on September 3, 1914, in Volume 198 of Trust Deeds at page 634 thereof, and said deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan and the promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars and interest secured thereby, were also dated September 2, 1914, and said deed of trust to R. McColgan and Eustace Cullinan was recorded on the 3d day of September, 1914, in Liber 210 of Trust Deeds at page 41 thereof in the office of the County Recorder of said County of Stanislaus.

That neither said R. S. Marshall nor Olive H. Marshall, his wife, ever had any negotiations with said Daniel A. McColgan relative to said loan of Two Thousand Four Hundred and Fifty-five ($2,-455.00) Dollars and that all negotiations and dealings relative to said loan of Two Thousand Four Hundred and Fifty-five ($2.455.00) of said Daniel A. McColgan were had and taken by and between plaintiff and said Daniel A. McColgan, and that the said sum of Two Thousand Four Hundred and

Fifty-five ($2,455.00) Dollars was loaned by said Daniel A. McColgan to the said R. S. Marshall and Olive H. Marshall, his wife, for the use and benefit of plaintiff, and at plaintiff's special instance and request.

X.

That the execution, on the 2d day of September, 1914, by R. S. Marshall and Olive H. Marshall, his wife, as the agent and representative of said Fred V. Lineker to said Daniel A. McColgan, of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, was intended by said Fred V. Lineker and by said Daniel A. McColgan to be, and was in fact an account stated between said Fred V. Lineker and Daniel A. McColgan, and was intended to be, and was in fact a final accounting between said [108] Fred V. Lineker and said Daniel A. McColgan of all debts and financial transactions between them up to the time of said execution of said promissory note for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, and by directing R. S. Marshall and Olive H. Marshall, his wife, as his agents to execute to said Daniel A. McColgan said promissory not for Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars, the said Fred V. Lineker intended to and did in fact acknowledge and agree that there was on said 2d day of September, 1914, and after said sale under said deed of trust dated June 20, 1910, a balance of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars due from said Fred V. Lineker to Daniel A. McColgan.

XI.

That neither before nor after notice of said sale under said deed of trust dated June 20, 1910, had been given by said R. McColgan, as such trustee, and neither prior nor subsequent to the sale of said real property by said trustee, did plaintiff and defendant, Daniel A. McColgan, or Daniel A. McColgan make or enter into any agreement wherein or whereby plaintiff and defendant, Daniel A. McColgan, or R. McColgan agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount, to pay the amount said defendant, Daniel A. McColgan claimed to be due him from said Norvena E. S. Lineker, or any other lien subsisting against said real property not secured by said deed of trust, and no such or similar agreement was made by Daniel A. McColgan with said plaintiff or any other person; that the said Daniel A. McColgan did not at any time inform said plaintiff that the said real property should be sold for the sum of Ten Thousand ($10,000.00) Dollars, and did not at any time inform said plaintiff that the said sum of [109] Ten Thousand ($10,000.00) Dollars would be sufficient to pay the amount claimed to be due him by Norvena E. S. Lineker, including the expenses of said sale, and any other liens not secured by said deed of trust; and said plaintiff and said defendant, Daniel A. McColgan did not, at any time, agree that plaintiff would bid the sum of Ten Thousand ($10,000.00) Dollars for said real property at said sale, either upon the understanding or agreement or otherwise

of said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant from said trustee, in the manner referred to in the complaint of plaintiff on file herein, said Daniel A. McColgan would not pay or cause to be paid any lien until the same had been judicially determined to be a valid and subsisting lien against said real property or upon the further or any understanding that said defendant, Daniel A. McColgan would account to plaintiff for any or all moneys coming to his hands as the proceeds of said sale; that said Daniel A. McColgan never agreed to account to plaintiff for any moneys coming into his hands as the proceeds of the said sale.

XII.

That neither prior nor subsequent to the said sale, under the said deed of trust dated June 20, 1910, was it agreed between plaintiff and said defendant, Daniel A. McColgan, or was it agreed by said Daniel A. McColgan that for the purpose of securing said Daniel A. McColgan, in the event that he should be made to pay any liens alleged to be subsisting against said real property and which were not secured by said deed of trust, plaintiff would execute and deliver to Daniel A. McColgan his promissory note for twenty-four hundred fifty-five ($2455.00) Dollars, or that plaintiff, in order to secure the payment of said [110] last mentioned note, would execute and deliver to said defendant, Daniel A. McColgan an indenture in writing wherein and whereby he would convey said real property, when he had acquired the title thereto,

to said defendant, Daniel A. McColgan, in trust, for any purpose.

XIII.

That the said real property was sold on the said 2d day of September, 1914, by said trustee, and at said sale, to said R. S. Marshall for the sum of Fourteen Thousand ($14,000.00) Dollars; that said R. S. Marshall paid therefore the said sum of Fourteen Thousand ($14,000.00) Dollars to said R. McColgan, as such trustee, but that said real property was not sold to or purchased by said R. S. Marshall in accordance with any agreement or understanding between said R. S. Marshall and defendants, Daniel A. McColgan or R. McColgan, or between plaintiff and said Daniel A. McColgan or R. McColgan; that said sum of Fourteen Thousand ($14,000.00) Dollars was paid by said R. S. Marshall to said R. McColgan, as such trustee, on the said 2d day of September, 1914, and was thereupon delivered and paid over to said defendant, Daniel A. McColgan, by said R. McColgan, said defendant, as such trustee; that on said 2d day of September, 1914, at the time of said sale, the said Daniel A. McColgan was the owner of said real property.

XIV.

That said plaintiff has demanded of said defendant, Daniel A. McColgan, that he render an account of said sum of Fourteen Thousand ($14,000.00) Dollars so paid to him by said R. McColgan, as such trustee, and said Daniel *R.* McColgan has refused to render [111] any account of said Fourteen

Thousand ($14,000.00) Dollars to plaintiff, or to pay any portion thereof to plaintiff.

XV.

That all the allegations in paragraph X of said plaintiff's complaint are, and each of them, is untrue and that plaintiff has had since the 2d day of September, 1914, full and complete knowledge of all the facts and transactions referred to in plaintiff's complaint.

XVI.

That the alleged cause of action set forth in plaintiff's complaint is not barred by the provisions of Subdivision 1, Sec. 329 of the Code of Civil Procedure of the State of California.

XVII.

That there was not at the time of the commencement of this action any other action pending between said plaintiff, or any of the defendants herein for the same cause, and that none of the issues of fact or of law involved in this action has been heretofore adjudicated in any action between plaintiff and any of the defendants herein.

CONCLUSIONS OF LAW.

And as Conclusions of Law from the foregoing facts, the Court finds:

I.

That at the time of said sale of said real property by said trustee on said 2d day of September, 1914, which sale was had as aforesaid under said deed of trust dated June 20, 1910, said Daniel A. McColgan was the owner of the real property described [112] in said deed of trust, and in said complaint on file herein and was the successor to, and the owner

of all the right, title and interest therein, which said Norvena E. S. Lineker had, or owned therein at the time of the execution of said deed of trust, or on the 7th day of August, 1913.

II.

That on the 2d day of September, 1914, at the time of said sale of said real property by said trustee as aforesaid, said Daniel A. McColgan was, and he is still entitled to any and all proceeds of said sale of said real property by said R. McColgan as aforesaid, named in said deed of trust, dated June 20, 1910, over and above the debts and obligations that were secured by said deed of trust.

III.

That on said 2d day of September, 1914, at the time of said sale by R. McColgan, the trustee under said deed of trust, dated June 20, 1910, of said real property, the said Fred V. Lineker was not the owner of said real property, or any interest therein, and was not entitled to any surplus, or any portion of any surplus that remained in the hands of R. McColgan as such trustee, as the proceeds of said sale of said real property by said trustee, after the payment of the debts secured by said deed of trust dated June 20, 1910.

IV.

That on the 2d day of September, 1914, an account was stated between said Fred V. Lineker and said Daniel A. McColgan of all transactions between said Fred V. Lineker and said Daniel A. McColgan referred to in the complaint of plaintiff and filed herein as having occurred prior to the

2d day of September, 1914, and in said account stated it was agreed by and between said [113] Daniel A. McColgan and said Fred V. Lineker that there was then on the 2d day of September, 1914, and after said sale so held on said date under said deed of trust dated June 20, 1910, a balance of Two Thousand Four Hundred and Fifty-five ($2,455.00) Dollars due to said Daniel A. McColgan from said Fred V. Lineker.

V.

That said Fred V. Lineker, the plaintiff, is not entitled to a judgment against any of said defendants herein for an accounting of the proceeds of said sale of said real property made by said R. McColgan as such trustee under said deed of trust dated June 20, 1910, as aforesaid, or of any of the dealings or transactions of said defendants, Daniel A. McColgan, or R. McColgan and Eustace Cullinan, referred to in the complaint of plaintiff herein; that plaintiff is not entitled to any relief whatsoever against any of said defendants.

VI.

That defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan are entitled to judgment against the plaintiff for their costs of suit.

Let judgment be entered accordingly.

Dated, April 30, 1918.

W. H. LANGDON,
Judge. [114]

Exhibit "D."

In the Superior Court of the State of California, in and for the County of Stanislaus.

No. 5344.

Dept. No. 2.

FRED V. LINEKER,

Plaintiff,

vs.

DANIEL A. McCOLGAN, R. McCOLGAN, EUSTACE CULLINAN, R. S. MARSHALL, and OLIVE H. MARSHALL, His Wife,

Defendants.

JUDGMENT.

(After Second Trial.)

The above-entitled action having been submitted to the Court for its decision and the Court having made and filed its findings of fact and conclusions of law, now orders, adjudges and decrees as follows, to wit:

That plaintiff is not entitled to the relief prayed for in his complaint or to any relief against the defendants, or any of them, and that defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan are entitled to judgment against plaintiff for their costs of suit amounting to ——— Dollars.

Done in open court this 30th day of April, 1918.

W. H. LANGDON,

Judge.

[Endorsed]: Filed Mar. 29, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly Mary J. Tynan), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased, (Submitted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Affidavit of the Defendant Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased.

City and County of San Francisco,
State of California,
Northern District of California,—ss.

Adelaide McColgan, being first duly sworn, deposes and says: That she is one of the defendants in the above-entitled action or suit; that affiant is the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and as such administratrix is one of the defendants in said action or suit; that the above-entitled action or suit was commenced during the lifetime of said Daniel A. McColgan and that said Daniel [116] A. McColgan died on May 12th, 1921, and since the filing of the bill of complaint in the office of the Clerk of the above-entitled court; that by an order of the above-entitled court, affiant, as the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, was substituted in the place and stead of said Daniel A. McColgan, deceased; that Honorable William C. Van Fleet, before whom the above-entitled action is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant, *that said Honorable William C. Van Fleet has a personal bias against affiant;* that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff

Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs and Mary J. Dillon and Thomas B. Dillon were defendants; that neither Daniel A. McColgan nor the defendant R. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action (viz., the action or suit of Norvena Lineker, et al., against R. S. Marshall, et al.), was commenced in the above-entitled court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the [117] above-entitled action before the plaintiffs should be permitted to offer evidence in support of the allegations of the bill of complaint; that such permission was granted by the Court, and the defendants thereupon introduced in evidence the judgment and judgment roll in an action pending in the Superior Court of the State of California, in and for the County of *Calaveras,* entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan, Eustace Culli-

nan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment-roll in an action pending in said Superior Court entitled R. S. Marshall and Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in evidence the *remittitur* of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgment supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in [118] proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the plead-

ings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated on principles there presented, he cannot have another day [119] in court to re-litigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was

something coming to Mrs. Lineker [120] and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I cannot see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here.

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a little brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment, with the presentation that has been made here, that there will be any room for any further light to be cast upon it by counsel. I just want to look at these

pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my [121] own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course, counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled, through the efforts of one of the counsel in this case, to recover a very considerable quantity of her property that had been, or its equivalent, taken from her. But that this property to-day is worth a great *deal than* has been recovered back to her I do not doubt.

Mr. TAUGHER.—Worth a hundred thousand dollars.

Mr. PARTRIDGE.—What nonsense.

The COURT.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to.

Mr. HARWOOD.—Has your Honor any objec-

tion to my handing you a memorandum on that matter containing the authorities?

The COURT.—No, sir, I don't wish any memorandum. I do not wish you to be heard in any further way than you have been. [122]

Mr. HARWOOD.—I have handed counsel here this.

The COURT.—Well, hand it to the clerk—are you asking to file something?

Mr. HARWOOD.—No, that is the only idea I had.

The COURT.—Oh, yes, I am willing for you to offer anything that has been presented here.

Mr. TAUGHER.—I did not file any authorities. If you care to have me I will do so.

The COURT.—I think it might be well to have this argument written out. Have you been taking down this whole thing (Addressing the Reporter)?

The REPORTER.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The COURT.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else. This stands submitted on the feature of the defense, the question of *res adjudicata.*"

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words "The Court"; that at the time the fore-

going statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of [123] said Honorable William C. Van Fleet is not based upon any evidence received in any action or proceeding in which said Daniel A. McColgan was a party or to which said Daniel A. McColgan was privy, and is not based on any evidence received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by said Daniel A. McColgan in the transaction described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which said Daniel A. McColgan was a party, or to which he was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C.

Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that said Daniel A. McColgan was not in fact dishonest or unscrupulous; that said Daniel A. McColgan never robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by said Daniel A. McColgan, and that in all transactions between said Daniel A. McColgan and said Norvena Lineker, said Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: That affiant did not at any time prior to the 24th day of January, 1922, [124] know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official steno-

graphic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter took down said statements in shorthand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery, so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable [125] diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1924,

said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set.

WHEREFORE, affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code, or chosen in the manner prescribed in Section 23 thereof, to hear such matter.

ADELAIDE McCOLGAN.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, do hereby certify that the foregoing affidavit and application are made in good faith.

ALFRED J. HARWOOD,

Counsel of Record for said Defendant.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Affidavit of the Defendant R. McColgan.

City and County of San Francisco,
State of California,
Northern District of California,—ss.

R. McColgan, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action or suit; that Honorable William C. Van Fleet, before whom the above-entitled action

is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant; that said Honorable William C. Van Fleet has a personal bias against affiant; that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff [127] Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs and Mary J. Dillon and Thomas B. Dillon were defendants; that neither affiant nor the defendant Daniel A. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said defendant Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action or suit (viz., the action or suit of Norvena Lineker et al., against R. S. Marshall, et al.), was commenced in the above-entitled Court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the above-entitled action before the plaintiffs should be permitted to offer evidence in support of the al-

legations of the bill of complaint; that such permission was granted by the Court, and the defendants thereupon introduced in evidence the judgment and judgment-roll in an action pending in the Superior Court of the State of California, in and for the County of Stanislaus, entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment-roll in an action pending in said Superior Court entitled R. S. Marshall and Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in [128] evidence the remittitur of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgments supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

"The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide [129] anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs, would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have

or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated, on principles there presented, he can not have another day in Court to relitigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am not fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in Courts of justice under certain [130] circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of

the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I can not see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here. [131]

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if

after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a litle brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment with the presentation that has been made here that there will be any room for any further light to be cast upon it by counsel. I just want to look at these pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled through the efforts of one of the counsel in this case to recover a very considerable quantity of her [132] property that had been, or its equivalent, taken from her. But that this property to-day is worth a great deal than has been recovered back to her I do not doubt.

Mr. TAUGHER.—Worth a hundred thousand dollars.

Mr. PARTRIDGE.—What nonsense.

The COURT.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense but with the fear that I shall not be able to.

Mr. HARWOOD.—Has your Honor any objection to my handing you a memorandum on that matter containing the authorities?

The COURT.—No, sir; I don't wish any memorandum. I do not wish you to be heard in any further way than you have been.

Mr. HARWOOD.—I have handed counsel here this.

The COURT.—Well, hand it to the Clerk—are you asking to file something?

Mr. HARWOOD.—No, that is the only idea I had.

The COURT.—Oh, yes; I am willing for you to offer anything that has been presented here.

Mr. TAUGHER.—I did not file any authorities. If you care to have me I will do so.

The COURT.—I think it might be well to have this argument written out. Have you been taking down this whole thing (addressing the Reporter)?

The REPORTER.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The COURT.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely [133] until I have opportunity to go into this matter. Is there anything

else. This stands submitted on the feature of the defense, the question of *res adjudicata.*"

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said Court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words "The Court"; that at the time the foregoing statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that affiant is a brother of said Daniel A. McColgan, deceased, and was beneficially interested with said Daniel A. McColgan in the transactions between the plaintiffs herein and Daniel A. McColgan referred to in the bill of complaint herein; that at all times in this affidavit mentioned, said Honorable William C. Van Fleet knew that affiant was a brother of said Daniel A. McColgan and at all of said times knew that affiant was and is beneficially interested with said Daniel A. McColgan in all of said transactions; that said Honorable William C. Van Fleet believes that affiant and said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that affiant is a dishonest and unscrupulous man; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of said Honorable William C. Van Fleet is not based upon any evidence

received in any action or proceeding in which either affiant or said Daniel A. McColgan was a party or to which either affiant or said Daniel A. McColgan was privy, and is not based on any evidence [134] received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by affiant and said Daniel A. McColgan in the transactions described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which either affiant or said Daniel A. McColgan was a party, or to which affiant or Daniel A. McColgan was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that neither affiant nor said Daniel A. McColgan was or is in fact dishonest or unscrupulous; that neither affiant nor said Daniel A. McColgan ever robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by affiant

or by said Daniel A. McColgan; that in all transactions between affiant and said Daniel A. McColgan, on the one part, and said Norvena Lineker on the other part, said affiant and Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: that affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal [135] prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in shorthand as aforesaid is named W. L.

Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and [136] used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1924, said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said Court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set.

WHEREFORE affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed

no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code, or chosen in the manner prescribed in Section 23 thereof, to hear such matters.

R. McCOLGAN.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. CASEY,

Notary Public, in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant R. McColgan, do hereby certify that the foregoing affidavit and application are made in good faith.

ALFRED J. HARWOOD,

Counsel of Record for said Defendant,

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [137]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of Adelaide McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant Adelaide McColgan, as administratrix with the will annexed of the Estate of Daniel A. McColgan, deceased, made and filed in the above-entitled cause an affidavit (accompanied by a certificate of counsel of record that such affidavit and application are made in good faith), that Honorable William C. Van Fleet, the Judge before whom said cause is pending, has a personal bias or prejudice against said defendant

and in favor of the plaintiff Norvena Lineker, a copy of which said affidavit is hereunto attached and made a part of this notice. You will also please take notice that on Monday, the 27th day of March, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-entitled Court, at San Francisco, California, said defendant will move Honorable William C. Van Fleet, the Judge of the above-entitled [138] Court, to designate another Judge in the manner prescribed in Section 20 of the Judicial Code and to make such order in the premises as is provided in Section 21 of the Judicial Code of the United States.

Such motion will be made upon the ground that said defendant has made and filed said affidavit, accompanied by the certificate required by law, and will be based upon said affidavit, said certificate, this notice of motion, and the pleadings in the above-entitled suit.

ALFRED J. HARWOOD,
Attorney for Said Defendant.

ADMISSION OF SERVICE.

Service and receipt of a copy of the foregoing notice of motion and application is hereby admitted this 20th day of March, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
JOHN S. PARTRIDGE,
Attorney for Certain Defendants Above Named.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

(Here follows copy of affidavit, etc.)

[Endorsed]: Filed Mar. 22, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of R. McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant R. McColgan, made and filed in the above-entitled cause an affidavit (accom-

and in favor of the plaintiff Norvena Lineker, a copy of which said affidavit is hereunto attached and made a part of this notice. You will also please take notice that on Monday, the 27th day of March, 1922, at the hour of 10 o'clock A. M., at the courtroom of the above-entitled Court, at San Francisco, California, said defendant will move Honorable William C. Van Fleet, the Judge of the above-entitled [138] Court, to designate another Judge in the manner prescribed in Section 20 of the Judicial Code and to make such order in the premises as is provided in Section 21 of the Judicial Code of the United States.

Such motion will be made upon the ground that said defendant has made and filed said affidavit, accompanied by the certificate required by law, and will be based upon said affidavit, said certificate, this notice of motion, and the pleadings in the above-entitled suit.

ALFRED J. HARWOOD,
Attorney for Said Defendant.

ADMISSION OF SERVICE.

Service and receipt of a copy of the foregoing notice of motion and application is hereby admitted this 20th day of March, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
JOHN S. PARTRIDGE,
Attorney for Certain Defendants Above Named.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

(Here follows copy of affidavit, etc.)

[Endorsed]: Filed Mar. 22, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Notice of Motion and Application of R. McColgan.

To the Plaintiffs, and to John L. Taugher, Esq., Their Attorney; to Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and to John S. Partridge, Esq., Their Attorney; and to Defendant Eustace Cullinan, and to Messrs. Cullinan & Hickey, His Attorneys:

You will please take notice that on March 16th, 1922, the defendant R. McColgan, made and filed in the above-entitled cause an affidavit (accom-

Reply Affidavit to Defendants' Motions and Affidavits Alleging Personal Bias and Prejudice of the Trial Judge Herein.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Frederick V. Lineker, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in the above-entitled suit; that Norvena Lineker died in Alameda County, State of California, on the 25th day of February, 1922; that by order of the Superior Court of the State of California in and for the County of Alameda, duly made and entered on the 29th day of March, 1922, affiant was duly appointed the administrator of the estate of said Norvena Lineker, deceased, duly qualified, and now is acting as such.

That said affiant individually and as said administrator of the estate of his former wife, Norvena Lineker, deceased, makes this affidavit in reply to the affidavits heretofore made and filed by Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and also in reply to the affidavit of R. McColgan, both defendants in the [142] above-entitled suit, who allege personal bias and prejudice against said McColgans by Honorable William C. Van Fleet, sitting as Judge of the above-entitled court and in the above suit. That affiant in reply to said affidavits so filed herein on or about March 20, 1922, alleges and avers as follows:

That affiant and his wife on or about January 22, 1922, were present in the above court at the commencement of trial of this suit on the issues joined by the plaintiff's bill of complaint and the defendants' answers thereto; that at no time prior to the commencement of said trial on January 22, 1922, were there any affidavits or allegations of any kind or nature made against said Honorable William C. Van Fleet, charging personal bias or prejudice on his part against either Daniel A. McColgan or R. McColgan, or any other person now named as one of the defendants in said suit.

That as a part of said defendants' case they interposed their pleas of *res judicata* on January 22, 1922, averring in support thereof, that by reason of certain litigation theretofore conducted in the State Courts of California, the same was a complete bar to any further proceedings on the part of plaintiffs in this suit. That no one of the defendants other than the said McColgans have intervened or participated in the presentation of said affidavits alleging personal bias and prejudice on the part of said Honorable William C. Van Fleet as said presiding Judge; that said Adelaide McColgan and R. McColgan only have presented such affidavits charging personal bias and prejudice; that there are nine other defendants. That said defendants, Adelaide and R. McColgan, in their own behalf raised said pleas of *res judicata,* with the other defendants, and duly submitted the same for decision to this Court; that after the presentation of said [143] pleas of *res judicata,* the ar-

guments thereon, the submission for decision and after an adverse ruling by the said Honorable William C. Van Fleet denying their pleas so raised and submitted by the defendants, including the said Adelaide and R. McColgan, said defendants last above named have now filed their affidavits charging personal bias and prejudice on the part of the said trial Judge, in an unjust and wrongful endeavor to remove him from the trial of said suit because, as affiant believes and avers, of said adverse ruling against said defendants.

That only a portion of the proceedings are set forth in said affidavits, and no part of the arguments of counsel. That the said purported transcript of the occurrences and remarks of court and counsel as set forth in said defendants' affidavits merely disclose the expression of the trial judge in commenting upon facts in a prior case already passed on, to which comments no exceptions were then and there taken by any of the defendants, and which, when taken as a whole, in no wise and in no manner express any personal prejudice or personal bias on the part of the trial Judge against the defendants, Adelaide or R. McColgan. On the other hand, it is clearly shown from the statements of said trial Judge, that the Court permitted and desired the presentation of further points and authorities on defendants' pleas of *res judicata* before continuing the case for trial on the merits and which pleas it was indicated he might have to sustain. That this indicated he could have no personal bias or prejudice as to said merits, no evi-

dence having been presented to him to pass on. That at no time or place did said presiding Judge so express himself as to indicate that he would in any way in passing upon the merits be unable to give a fair and impartial trial to the said defendants, Adelaide, or R. [144] McColgan, or either of them. That certain comments by the Court were called forth by the arguments of counsel on said 24th day of January, 1922, but they in no way referred to the said McColgan Brothers, in this suit, or in any way indicated that the said Court could not fairly or impartially try this suit on its merits. That said affidavits so filed are attempts, following an adverse decision, after commencement of trial, to assault the integrity of the trial Judge. That said statements of the trial court and colloquy between Court and counsel, were duly made in a regular discharge of the judicial duty of the Court in passing upon the motion made and the arguments of counsel, and in the due course of the trial of a case begun before the said Court, in which no charge of personal bias or prejudice had ever been made prior to the commencement of said trial.

That affiant believes, and therefore avers that the said Honorable William C. Van Fleet does not believe that the said Daniel A. McColgan or R. McColgan, or either of them, in any way were dishonest or unscrupulous, or had robbed the said plaintiffs; denies that said Honorable William C. Van Fleet as trial Judge in the said suit had or has any personal bias or personal prejudice against the said McColgans whatsoever; denies that said

Honorable William C. Van Fleet believes that said Daniel A. McColgan was a dishonest or an unscrupulous man. Affiant believes, and so avers, that the said Honorable William C. Van Fleet is not, nor at any time has he been, biased or prejudiced against any of the parties to the said suit, and further avers that such issues as may be tried in said suit will be determined by him fairly and impartially on the evidence as presented. Affiant further avers that no facts are averred in said affidavits from which it can reasonably or otherwise be inferred the said Honorable William C. Van Fleet as said judge at any time or place has had, or that he now has, [145] any belief or opinion whatsoever that either of the said McColgan brothers wronged or defrauded the plaintiff Norvena Lineker, or any other person, but that the said Judge presiding in this suit at all times can and will act fairly and impartially in the trial of the same on the merits.

That the said affidavits of said Adelaide McColgan and R. McColgan are impertinent, scandalous, untrue, unwarranted, and a wrongful attack upon the integrity, fairness and impartiality of the trial Judge, made after an adverse decision on said defendants' pleas of *res judicata,* interposed after the commencement of, and during trial.

WHEREFORE, affiant avers and prays that said charges so made be adjudged to be impertinent, scandalous, untrue and unwarranted; that said defendants' motion to call in another Judge to conclude said trial be denied; and that said affidavits

alleging personal bias and prejudice, the motions and documents in support thereof, be stricken from the files in this suit. Further affiant sayeth not.

FREDERICK V. LINEKER.

Subscribed and sworn to before me this 30th day of March, 1922.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [146]

Copy of the within affidavit received this 30th day of March, 1922.

_____,

Solicitor for Defendants Adelaide McColgan and R. McColgan.

CULLINAN & HICKEY,

Solicitors for Defendant Eustace Cullinan.

JOHN S. PARTRIDGE,

Solicitor for the Remaining Defendants.

[Endorsed]: Filed Apr. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [147]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

FREDERICK V. LINEKER et al.,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Stenographic Reporter's Transcript of Proceedings on Motions and Applications.

Monday, April 3, 1922.

Outline of argument on defendants' motions and affidavits alleging personal bias and prejudice of the trial Judge herein.

ALFRED J. HARWOOD, Esq., Appearing for Defendants.

WM. F. ROSE, Appearing for Plaintiffs.

Mr. HARWOOD.—(Read "affidavit of the defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and certificate of counsel of record.")

Mr. HARWOOD.—(Contg.) Now if the Court please the affidavit of the other defendant R. McColgan is in most respects similar and contains practically the same reasons and I would ask the Court that they may be considered read. Now, if the Court please, I have carefully examined the authorities. A case decided by the United States Supreme Court, Berger vs. United States, 255 [148] U. S. 32—and that case and the other authorities hold that clearly, or to the effect rather, that this affidavit fully complies with Section 21 of the Judicial Code. (Stated case of Berger vs. United States.)

The COURT.—I tell you, Mr. Harwood, all this that you have stated here is based upon facts that came out in the case of Lineker vs. Dillon and that

was fully known to the parties long before this came up. With that knowledge *that* proceeded to submit this case to this Court, and they then went so far as to leave it under submission to this Court after the remarks made there based upon the evidence in Lineker vs. Dillon and the presentation accordingly comes too late. You cannot eat your cherries and have them. You must proceed in accordance with the statute and take your remedy within the time, or be able to show some reason why you failed to. There is no reason here shown. You were willing to permit the matter to be submitted to this Court and took your chance on a favorable decision and the Court, having reached the conclusion that there was not sufficient before it to enable it to pass upon the defense of *res adjudicata,* set that submission aside, and now the party comes in and sets up prejudice.

Mr. HARWOOD.—If the Court please, in the first place permit me to make the statement that I had to get the facts together and prepare this affidavit which took some time as shown by the affidavit itself.

The COURT.—You had lots of time before the Court reached the conclusion that it could not on the facts determine on the question of *res adjudicata.* You had several weeks to do that before the Court announced its conclusion and set the case at [149] large again for a trial upon the merits.

Mr. HARWOOD.—In this matter I would ask your Honor before passing on the matter to read the points and authorities which are filed.

The COURT.—I will do that certainly. I do not know this family of McColgans but I do know what my judgment is upon sworn evidence given before me in a trial and I took occasion in the case in question, and it is referred to in this affidavit, in the recital of the affidavit, and I took occasion at that time in the Lineker vs. Dillon case to state that the evidence of the man himself showed that he had been guilty of it. That is all I did. Now if that constitutes legal prejudice here of course that is one thing but I do not think it does.

Mr. HARWOOD.—The matter that you have suggested that the affidavit was filed too late is a matter that I have not discussed in the briefs.

The COURT.—Both your clients knew the attitude of mind of the Court on what occurred in the case of Lineker vs. Dillon. Your clients were present and heard the comments of the Court upon the disclosures in that case and that is exactly what is set forth in this affidavit and nothing else, and those statements arose solely, and were based solely, upon the sworn evidence in that case. Now, if that constitutes that character of bias and prejudice which will preclude one who was only desirous of stating the facts from hearing a case then that is all right.

Mr. HARWOOD.—I think it does if the Court please.

The COURT.—Well, I do not think so. I will give you a chance to be heard on the matter of time in presenting the matter. I will hear from the other side. [150]

Mr. BELL.—I have an affidavit here of Frederick V. Lineker—

Mr. HARWOOD.—I wish to object to the reading of the affidavit on the grounds stated in the case of Berger vs. United States.

The COURT.—Read it. Let me hear it.

(Mr. Bell read affidavit of Frederick V. Lineker.) (Also read Section 21 of the Judicial Code and commented on Justice McKenna's decision in case of Berger vs. United States.)

Mr. BELL.—There are eleven defendants in the case, two are complaining, the other nine are not.

The COURT.—I do not think there is anything in that. I think if there were a hundred defendants if one could show prejudice here the case could not be tried as to him by a prejudiced Judge.

Mr. BELL.—I understand that theory, but what I wanted to point out is that at the time when the statements were alleged to have been made, on the 25th of January, there was no objection made or exceptions taken under the rule to any of the remarks of the Court by any of the defendants or counsel—not one out of the entire eleven. It is very clear from a portion of the affidavit which I set out in my brief where the Court said, "I will continue the case on the merits until I have been able to examine those questions for myself with the hope, as I say, that I may be able to avoid this defense but with the fear that I shall not be able to," which indicates a leaning toward the defendants' side of the case and clearly does not show any [151] prejudice.

The COURT.—I do not believe any counsel familiar with the history of the matter would file any such affidavit. Counsel claims he did not know anything about it. If he didn't he should have inquired.

Mr. BELL.—(On point of exceptions to remarks of the Court Mr. Bell cited following cases:

Denver v. Home Savings Bank, 200 Fed. 28.
Railway Company v. Heck, 102 U. S. 120.
Potter v. United States, 122 Fed. 49.
————, 196 Fed. 203.)

(Contg.) It seems to me that this is entirely too late for alleging personal prejudice contemplated by this Code section after the motion bringing the matter before the Court is made, then submitting to the jurisdiction of the Court, awaiting a decision and then after an adverse ruling to come in and interfere in this way with the trial of a case is not permitted under any authorities either in the State or Federal courts.

The COURT.—(To Mr. Harwood.) I will give you five days in which to answer this proposition that your affidavit was presented too late.

Mr. HARWOOD.—Yes, your Honor.

The COURT.—And then they can have five days in which to answer. Are the points and authorities on file on the general proposition?

Mr. HARWOOD.—Yes, your Honor. Will your Honor rule on the objection to the reading of the affidavits?

The COURT.—Yes, it is overruled.

Mr. HARWOOD.—Will you note an exception Mr. Clerk?

The COURT.—He doesn't need it, but you will be accorded it if anything comes up on a bill of exceptions. [152]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of August, in the year of our Lord one thousand nine hundred and twenty-two—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—August 21, 1922—Order Denying Motions for Designation of a Judge Other Than Honorable Wm. C. Van Fleet.

The motion of defendants Adelaide McColgan, as administratrix with the will annexed of the Estate of Daniel A. McColgan, deceased, and the motion of defendant R. McColgan, for the designation of a Judge other than Honorable William C. Van Fleet, under the provisions of Sec. 20 of the Judicial Code, heretofore submitted being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motions be and they are hereby denied; to which ruling the said defendants duly excepted. [153]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER,

Plaintiff,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Memorandum Opinion.

JOHN L. TAUGHER and WM. F. ROSE, San Francisco, Cal., Attorneys for Plaintiff.

ALFRED J. HARWOOD, San Francisco, Cal., Attorney for Defendants R. McColgan and Adelaide McColgan, Administratrix, etc.

VAN FLEET, District Judge:

This is an application under the supposed sanc-

tion of Section 21 of the Judicial Code to disqualify the Judge of this Division in the further disposition of this cause for the alleged entertaining of a sentiment of personal bias and prejudice against two of the defendants, R. McColgan and Daniel A. McColgan, deceased, the intestate of the defendant Adelaide McColgan, the administratrix of his estate. The proceeding was inaugurated under these circumstances: [154]

The cause, which had been pending and at issue for a year or more, came on for trial on January 22d of the present year and thereupon a request was made by the defendants that the Court permit them, before entering upon a hearing of the merits, to interpose proof in support of their special defense of *res judicata* which it was claimed would save much unnecessary time. This course was allowed and thereupon, after the introduction of certain record proof by the defendants in the form of judgment-rolls in certain actions theretofore adjudicated in the State courts and full argument by counsel on both sides, which ended on January 24th, the question as to the sufficiency of the evidence to sustain such defense was submitted, with the understanding that the hearing on the merits of the case would be continued to abide the Court's ruling upon the special defense. In taking the matter under advisement the Court gave expression in substance to the statement set forth in the affidavit of the defendant Adelaide McColgan and now relied upon as disclosing the bias and prejudice in the mind of the Court, afford-

ing the basis of this application. At the time of this statement by the Court all the defendants, with their several counsel were present and no objection, suggestion or intimation was made indicating that there existed in the mind of any one of them the idea that there was any ground arising on the remarks of the Judge for the objection now made; but the Court was permitted to take the case under advisement with the announcement that it would examine into the evidence and authorities bearing upon the special plea and with the tentative suggestion that it was impressed with the idea from the presentation had that the defense would have to be sustained. The case rested under submission from January 24th until March 13, whereupon the Court, in the presence of the parties and their counsel, announced its oral opinion on the question in the following terms: [155]

"In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 506.

"FREDERICK W. LINEKER et al.,
Plaintiffs,

vs.

R. S. MARSHALL et al.,
Defendants.

"The COURT (Orally).—In this case the action was recently on the calendar for trial and at the

trial the defendant primarily presented questions of *res judicata* based upon two separate actions in the State court claimed to be dependent upon the same issues. As I had occasion to say at the time, if this plea should be held good it would be unnecessary to go into a consideration of the merits of the case which would necessitate the taking of a considerable amount of evidence, and I therefore let the parties submit this question and continued the hearing on the issued involved in the merits.

"As a result of further consideration I am left in very decided doubt as to whether or not there is sufficient identity of issues between the questions involved here and those presented in the cases in the State court, and particularly whether in one of those cases, that of Lineker vs. McColgan, all the questions that were found upon by the court below there were litigated. Judging from the presentation taken from the briefs of the defendant here, in the Supreme Court in that case it looks much as though the court had gone outside any presentation of facts before it and found upon a number of questions that were not mooted at the trial and of course, if that is true, they cannot be made the proper basis here for the doctrine of *res judicata;* and I am satisfied that it can only be determined, as to what precise issues were before the State court in those cases, in a manner to enable this court to definitely pass upon them, by resorting to the evidence that was presented to the State [156] court. Of course the doctrine includes the right to present to the court not only the issues as presented by the

pleadings but the evidence itself as to what was really before the court on the trial, the judgment of which is sought to be interposed as the basis of the defense of *res judicata.*

"The result is that the submission heretobefore had in the case will be set aside and the case restored to the calendar for a final hearing upon the issues made."

Thereupon, in accordance with the suggestion in said opinion, the Court made an order that the cause be restored to the calendar for a final hearing upon all the issues. Thereafter on the 16th day of March and before the hearing of the cause was resumed the affidavits relied on by the moving defendants, Adelaide McColgan and R. McColgan, were presented and filed, none of the other defendants joining therein or participating in their subsequent presentation. Subsequently the plaintiff, Frederick V. Lineker (his codefendant, Norvena Lineker, having deceased and he having been appointed administrator of her estate) asked and was granted leave to file an affidavit in response to those presented by the defendants, and thereafter the matter came on to be heard before the Court upon a formal motion by the moving defendants for the granting of the application. Upon this hearing it appeared that the subject matter upon which the Court's alleged bias and prejudice is now predicated first arose in the case of Norvena Lineker vs. Mary J. Dillon, et al., involving another phase of the same controversy tried before the Court in 1919 and in which Daniel A. McColgan

testified as to his relations to the property of Norvena Lineker during which trial the Judge first gave voice to expressions [157] substantially similar to those complained of here—both of the McColgans being in court at the time. It was further made to appear at the hearing that the Judge had absolutely no personal acquaintance with either Daniel A. McColgan or R. McColgan and was unable to distinguish them by their names and, as then stated by the Judge, any idea or sentiment of personal bias or prejudice against the McColgans had never entered his mind but that all that had been expressed by him and now made the subject of complaint was based solely and alone upon impressions made upon his mind by the testimony in the case of Lineker vs. Dillon given by Daniel A. McColgan as to his participation in the transaction there involved and that the Judge was not now aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all the defendants.

Assuming that the application has been made in good faith I think it sufficient to say that the facts do not in my judgment afford a sufficient basis to work a disqualification under Section 21 of the Code. In the first place by its very terms the section negatives the idea that a party may sit by after having the claimed disqualifying circumstances brought directly to their knowledge months before the term and let the cause go to trial without interposing the objections. The disqualifying affi-

'davit must be filed ten days before the term "unless good cause be shown for the failure"; and this cause must appear on the face of the affidavit. Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of Lineker vs. Dillon in 1919, and there is nothing to excuse the delay. If it be claimed that the disqualification [158] was disclosed for the first time upon the statement made by the Judge on the submission of the question of *res judicata* the defendants are in no better position since it appears that they sat mute under that statement without objection or suggestion and permitted the cause to be taken under submission and held for over six weeks before decision and then moved only when the conclusion of the Judge was not what they had hoped. A party cannot be permitted to thus sit silent and gamble on a favorable result and, losing out, attempt for the first time to assert his right. I am satisfied the assertion of the right claimed here came too late to justify its recognition.

But there is another and deeper reason for denying the application. A consideration of the section under which the claim is made shows at once that the mere assertion of a bias or prejudice on the part of a Judge is insufficient to work a disqualification. There must be a statement of the facts tending to show such state of mind; and obviously those facts must be such as would reasonably be calculated to disclose the existence of the disqualifying attitude specified in the Statute.

The facts stated in these affidavits wholly fail to meet that requirement. "Personal" bias or prejudice cannot properly be said to arise from views formed in the mind of a Judge, however freely expressed, founded upon sworn testimony in a cause before him upon which he is called upon to pass. If it were otherwise no Judge would be qualified to re-try a cause upon which he had been required to pass where for any reason the judgment first entered had to be set aside and the cause reheard. This is not the meaning of the statute.

For these reasons the application is denied.

[Endorsed]: Filed August 21, 1922. Walter B. Maling, Clerk. [159]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and NORVENA LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL et al.,

Defendants.

Order Making Certain Proceedings a Part of the Record Herein.

On motion of the defendants Adelaide McColgan, as administratix with the will annexed of the estate

of Daniel A. McColgan, deceased, and R. McColgan. It is hereby ordered that the following matters and proceedings be and the same are hereby made a part of the record herein viz.:

1. The affidavit of the defendant Adelaide McColgan as administratix of the state of Daniel A. McColgan purporting to have here made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the clerk of the above-entitled Court on the 16th day of March 1922.

2. The affidavit of the defendant R. McColgan purporting to have here made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the Clerk of the above-entitled Court on the 16th day of March 1922.

3. The notice of motion and application of the defendant Adelaide McColgan as administratix with the will annexed of the estate of Daniel A. McColgan, deceased for an order of the Honorable William C. Van Fleet designating another [160] Judge as provided in section 21 of the Judicial Code, which said Notice of Motion and Application was filed with the Clerk of the above-entitled Court on the 22d day of March, 1922.

4. The notice of motion and application of the defendant R. McColgan for an order of the Honorable William C. Van Fleet designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application

was filed with the Clerk of the above-entitled Court on the 22d day of March, 1922.

5. The reply affidavit of the plaintiff Frederick V. Lineker to defendants' motions and affidavits alleging personal bias and prejudice which said affidavit of said plaintiff was filed with the Clerk of the above-entitled court on the 1st day of April, 1922.

6. The stenographic reporter's transcript of the proceedings at the hearing of the said motions and applications a copy of which is attached to notice of motions of the said defendants Adelaide McColgan as administratix with the will annexed of the estate of Daniel A. McColgan, deceased; and R. McColgan filed with the Clerk on the 30th day of August, 1922.

7. The opinion and order of the above-entitled court made on August 21, 1922, denying said motions and applications and the exceptions thereto of said defendants.

Done in open court the 18th day of September, 1922.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sept. 18, 1922. Walter B. Maling, Clerk. [161]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 19th day of October in the year of our Lord one thousand nine hundred and twenty-two — Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

(Title of Cause.)

Minutes of Court—October 19, 1922—Order of Substitution.

Upon motion of Wm. F. Rose, Esq., attorney for plaintiffs and upon suggestion of the death of Norvena Lineker one of the plaintiffs herein, it is ordered that Frederick V. Lineker, administrator of the estate of Norvena Lineker, deceased, be and he is hereby substituted as plaintiff in the place and stead of said Norvena Lineker, deceased. [162]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER as Administrator of the Estate of NORVENA LINEKER, Deceased,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Assignment of Errors.

Now come the above-named defendants Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased (substituted in the place and stead of said Daniel A. McColgan, deceased), and R. McColgan and file with their petition for an appeal from an order

made and entered in the above-entitled court on the 21st day of August, 1922, denying their motions for the designation of a Judge other than Honorable William Van Fleet under the provisions of section 20 of the Judicial Code, the following assignment of errors; and specify that said order is erroneous in this:

1. That upon the filing of the affidavit of said defendants accompanied by the certificate of counsel provided for by section 21 of the Judicial Code, it was the duty of the Judge to [163] designate another judge as provided in sections 20 and 21 of the Judicial Code.

2. That the Judge and the Court erred in denying said motion on the ground that the affidavits of said defendants did not state sufficient facts and reasons for the belief of such defendants that bias and prejudice existed, whereas in fact said affidavits and each of them state sufficient facts and reasons for the belief that bias and prejudice exists and existed.

3. That the Judge and the Court erred in denying said motions to designate another Judge on the ground that said affidavits were not filed within the time permitted by section 21 of the Judicial Code, whereas in fact said affidavits and each of them were filed within the time provided for by said section 21 of the Judicial Code.

4. That the Judge and the Court erred in denying said motions to designate another Judge on the ground that good cause was not shown for the failure to file said affidavits not less than ten days be-

fore the beginning of the term of the court, whereas good cause was in fact shown for such failure.

5. That the Judge and the Court erred in allowing to be read in evidence at the hearing of said motions the affidavit of the plaintiff, Frederick V. Lineker.

6. That the Judge and the Court erred in proceeding further in the above-entitled suit after the filing of said affidavits of said defendants accompanied by the certificate of counsel that the affidavits and applications are made in good faith.

7. That the Judge and the Court erred in holding that it was necessary for counsel for said defendants on January 24, 1922, to object to the statements then made by said Judge and that [164] for their failure to object the said defendants were debarred from thereafter urging the objection of bias and prejudice as specified in their said affidavits.

8. That the Judge and the Court erred in holding that said affidavits were not sufficient because they were made and filed after the Court had decided the questions of *res judicata.*

9. That the Judge and the Court erred in holding that bias and prejudice cannot be properly said to arise when the statements relied upon as showing bias and prejudice were made by the Judge in the course of the trial of an action to which action neither of said defendants nor their privies was a party.

Wherefore said defendants pray that said order be reversed.

Dated Oct. 19, 1922.

ALFRED J. HARWOOD,
Attorney and Solicitor for Said Defendants.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [165]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER as Administrator of the Estate of NORVENA LINEKER, Deceased,
Plaintiff,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,
Defendants.

Petition for Order Allowing Appeal.

The above-named defendants, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased (substituted in the place and stead of said Daniel A. McColgan, deceased), and R. McColgan conceiving themselves aggrieved by the order made and entered in the above-entitled court on the 21st day of August, 1922, denying the motion of said defendants for the designation of a Judge other than Honorable William C. Van Fleet under the provisions of section 20 of the Judicial Code, hereby appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit and upon the grounds specified in their assignment of errors filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made and [166] entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 19, 1922.

ALFRED J. HARWOOD,
Attorney and Solicitor for Said Defendants.

Order Allowing Appeal.

The foregoing petition for appeal is hereby allowed.

W. H. HUNT,
Judge.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [167]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A.

McColgan, deceased, and R. McColgan, as principals, and American Indemnity Company, a corporation, duly organized and existing under the laws of the state of Texas, and engaged in business in said State of California pursuant to the laws thereof, as surety, are held and firmly bound unto the plaintiffs above named and to the defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, defendants above named in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, to be paid to the said plaintiffs and to said defendants last named, their successors, heirs, executors, [168] administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

In Witness Whereof, the said principals have hereunto set their hands and seals, and the said surety has caused its corporate name and seal to be hereunto affixed, this 19th day of October, 1922.

THE CONDITION of the above obligation is such THAT WHEREAS on the 21st day of August, 1922, an order was rendered and entered in the above-entitled cause in the Southern Division of the United States District Court for the Northern District of California, Second Division, denying the motion of defendants, Adelaide McColgan, as administrator with the will annexed of the estate

of Daniel A. McColgan, deceased, and R. McColgan, for the designation of a Judge other than Honorable William C. Van Fleet, under the provisions of section 20 of the Judicial Code, and the said defendants last named having obtained an order allowing an appeal from said order, and a citation directed to the said plaintiffs and the defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco in said Circuit on the 17th day of November next.

NOW, THEREFORE, if the said defendants shall prosecute [169] said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ADELAIDE McCOLGAN, (Seal)
As Administratrix of the Will Annexed of the Estate of Daniel A. McColgan, Deceased.
R. McCOLGAN. (Seal)
AMERICAN INDEMNITY COMPANY.
By THEODORE P. STRONG, (Seal)
Attorney in Fact.

Order Approving Bond.

The above bond is hereby approved.

Dated at San Francisco, October 19, 1922.

W. H. HUNT,
Judge.

[Endorsed]: Filed Oct. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [170]

(Title of Court and Cause.)

Praecipe for Record on Appeal.

To the Clerk of said Court:

Sir: Please prepare transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit and incorporate therein the following portions of the record:

1. Plaintiffs' amended bill of complaint.

2. Answer of the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan.

3. The affidavit of the defendant, Adelaide McColgan as administratrix of the estate of Daniel A. McColgan, purporting to have been made pursuant to section 21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the clerk of the above-entitled court on the 16th day of March, 1922.

4. The affidavit of the defendant, R. McColgan, purporting to have been made pursuant to section

21 of the Judicial Code and the certificate of counsel of record thereto attached, which said affidavit and certificate were filed with the Clerk of the above-entitled court on the 16th day of March, 1922.

5. The notice of motion and application of the defendant, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, for an order of the Honorable William C. Van Fleet designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application was filed with the Clerk of the above-entitled court on the 22d day of March, 1922.

6. The notice of motion and application of the defendant, R. McColgan, for an order of the Honorable William C. Van Fleet [171] designating another Judge as provided in section 21 of the Judicial Code, which said notice of motion and application was filed with the Clerk of the above-entitled court on the 22d day of March, 1922.

7. The reply affidavit of the plaintiff, Frederick V. Lineker to defendants' motions and affidavits alleging personal bias and prejudice which said affidavit of said plaintiff was filed with the Clerk of the above-entitled court on the 1st day of April, 1922.

8. The stenographic reporter's transcript of the proceedings at the hearing of the said motions and applications a copy of which is attached to notice of motions of the said defendants, Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and R.

McColgan, filed with the clerk on the 30th day of August, 1922.

9. The order of the above-entitled Court made on August 21, 1922, denying said motions and applications and the exceptions thereto of said defendants.

10. Opinion of Court filed on August 21, 1922.

11. Order making certain proceedings a part of the record herein filed on the —— day of September, 1922.

12. Order substituting Frederick V. Lineker as administrator in place and stead of plaintiff, Norvena Lineker.

13. Petition of the defendants, Adelaide McColgan as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and R. McColgan for order allowing appeal.

14. Assignment of errors.

15. Bond on appeal.

16. Order allowing appeal.

17. Citation on appeal and proof of service.

Dated: November 8, 1922.

ALFRED J. HARWOOD,
Solicitor for Appellants. [172]

ADMISSION OF SERVICE.

Service of the foregoing praecipe is hereby admitted this 8th day of November, 1922.

JOHN L. TAUGHER and
WM. F. ROSE,
Attorneys for Plaintiffs.
HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan.

[Indorsed]: Filed Nov. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [173]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred seventy-three (173) pages, numbered from 1 to 173, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same consti-

tutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $84.45; that said amount was paid by Alfred J. Harwood, Esq., attorney for defendants Adelaide McColgan, as Admrx., etc., and R. McColgan; and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of December, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [174]

Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Frederick V. Lineker and Frederick V. Lineker, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (number 506 in Equity on the records of said court) and to R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck. T. K. Beard, Grace A. Beard, Union Savings

Bank of Modesto, and Stanislaus Land and Abstract Company, defendants in said suit, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, to wit, on the 17th day of November, 1922, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California (Second Division), wherein Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. McColgan, are appellants, and you are appellees, to show cause, if any there be, why the order rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H, HUNT, United States Circuit Judge for the Ninth Circuit, this 19th day of October, A. D. 1922.

W. H. HUNT,
United States Circuit Judge. [175]

Service of the within citation, by copy, is hereby admitted, this 20th day of October, 1922.

JOHN L. TAUGHER,
WM. F. ROSE,
Attorneys for Plaintiffs.
HAWKINS & HAWKINS,
MASTICK & PARTRIDGE,
Attorneys for R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Unions Savings Bank of Modesto and Stanislaus Land and Abstract Company.
CULLINAN & HICKEY,
Attorneys for Defendant, Eustace Cullinan. [176]

[Endorsed]: No. 506—In Equity. United States District Court for the Northern District of California. Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, and R. McColgan, Appellants, vs. Frederick V. Lineker et al., Appellees. Citation on Appeal and Proof of Service. Filed Oct. 23, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3964. United States Circuit Court of Appeals for the Ninth Circuit. Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, and R. McColgan, Appellants, vs. Frederick V. Lineker and Frederick V. Lineker, as Administrator of the Estate of Norvena Lineker, Deceased, the Plaintiffs in a Suit Pending in the Southern Division of the

United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of Said Court), and R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(EQUITY No. 506 in District Court.)

FREDERICK LINEKER et al.,
Plaintiffs and Appellees,
vs.

R. S. MARSHALL et al.,
Defendants and Appellees;

ADELAIDE McCOLGAN, etc., and R. McCOLGAN,
Defendants and Appellants.

Order Extending Time to and Including December 17, 1922, to File Record and Docket Cause.

GOOD CAUSE APPEARING, it is hereby ordered that the time of the above-named appellants to file the record of their appeal and docket the case with the clerk of the above-entitled court BE AND THE SAME IS HEREBY enlarged and extended to and including the 17th day of December, 1922.

Dated November 8th, 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3964. In the United States Circuit Court of Appeals for the Ninth Circuit. Frederick Lineker et al., Plaintiffs and Appellees, vs. R. S. Marshall et al., Defendants and Appellees; Adelaide McColgan, etc., and R. McColgan, Defendants and Appellants. Order Enlarging Time to File Record and Docket Case. Dated November ——, 1922. Filed Nov. 8, 1922. F. D. Monckton, Clerk. Refiled Jan. 2, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Undocketed.)

(EQUITY No. 506 in District Court.)

FREDERICK LINEKER et al.,
Plaintiffs and Appellees,

vs.

R. S. MARSHALL et al.,
Defendants and Appellees;

ADELAIDE McCOLGAN, etc., and R. McCOLGAN,
Defendants and Appellants.

Order Extending Time to and Including January 2, 1923, to File Record and Docket Cause.

GOOD CAUSE APPEARING, it is hereby ordered that the time of the above-named appellants to file the record of their appeal and docket the case with the clerk of the above-entitled court BE AND THE SAME IS HEREBY enlarged and extended to and including the 2d day of January, 1923.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3964. (Equity No. 506 in District Court.) In the United States Circuit Court of Appeals for the Ninth Circuit. Frederick Lineker et al., Plaintiffs and Appellees, vs. R. S. Marshall et al., Defendants and Appellees; Adelaide McColgan, etc., and R. McColgan, Defendants and Appellants. Order Enlarging Time to File Record and Docket Case. Filed Dec. 7, 1922. F. D. Monckton, Clerk. Refiled Jan. 2, 1923. F. D. Monckton, Clerk.